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CANCELLATION OF FEDERAL OIL & GAS LEASES: A JUDICIAL FUNCTION

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CANCELLATION OF FEDERAL OIL & GAS LEASES: A JUDICIAL FUNCTION

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The question of whether or not the Secretary of the Interior may administratively cancel outstanding oil and gas leases on the public lands was rather recently brought into focus by the case of Pan American Petroleum Corp. v. Pierson, wherein Judge Breitenstein said:

> "The Secretary of the Interior has no powers except those granted or those necessarily implied from granted powers. . . . The courts have repeatedly held that he is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provision giving him power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. Otherwise the new system created by the Mineral Leasing Act for the disposition of the mineral reserves found on the public lands fails of its purpose. Certainty of title is an elementary prerequisite for the sound development of any mineral resource." [1]

The problem has been with us for several years, and although it has been before the courts only infrequently, it assumes considerable importance due to the large amount of acreage held under federal oil and gas leases. In its petition to the Supreme Court in the Pierson [2] case, the government stated that as of ". . . June 30, 1960, there were outstanding 139,000 leases supervised by the Department of Interior under the Mineral Leasing Act of 1920, . . .

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1. 284 F.2d 649, 655 (10th Cir. 1960), cert. denied, 366 U.S. 936 (1961)
2. Petition for certiorari, Pan American Petroleum Corp. v. Pierson, 366 U. S. 936 (1961)

which covered 113,000,000 acres. The total number of outstanding leases supervised by the Department under all programs--public lands, acquired lands, Indian, Naval Petroleum Reserve, and Outer Continental Shelf--was 159,000, covering 125,000,000 acres." [3]

Between the passage of the Mineral Leasing Act of 1920 [4] and 1938, the Secretary of the Interior made no attempt to cancel leases by administrative action. Indeed, in 1930 he expressed the opinion that he was without power to cancel an outstanding lease except through court proceedings instituted by the Attorney General. [5] In 1938, however, he took the position that he had the power to determine whether or not title to the leasehold passed out of the United States upon issuance of the lease. If he concluded that it did not, he further reasoned "there is no reason why the Department should not have authority to cancel such a lease just the same as if it had been a prospecting permit." [6]

From 1938 to the present, oil and gas leases covering untold thousands of acres of the public lands have been cancelled by administrative action. In a case now pending before the United States Court of Appeals for the District of Columbia, the government stated in its brief that in the

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3. Id at 10
4. Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. §§ 181-287 (1958) (hereinafter called the Leasing Act)
5. Melish Consolidated Placer Oil Mining Co. v. Testerman, 53 I.D. 205 (1930)
6. Fenelon Boesche, A21230 (Feb. 21, 1938) (unpublished)

three year period ending June 30, 1960, the Department had administratively cancelled 1,129 oil and gas leases. That the Secretary has been challenged in the courts as rarely as he has is probably due to the fact that most of the leases involved wildcat acreage which would not justify the costs of litigation.

In considering the problem it is important to note the cases in which the power has been given consideration by the courts. In Bell Oil & Gas Co. v. Wilbur [8] it was stated that the Secretary did not possess the power, under the terms of the Leasing Act, to cancel an oil and gas lease on public lands by administrative action. McKay v. Wahlenmaier, [9] decided in 1955, and by the same court but without reference to the Bell case, suggests the contrary. In that case the court stated:

> "The Secretary's decision (not to cancel the lease) was probably based on confusion as to the nature of the question before him, and misapprehension of his own power and duty to cancel a lease obtained as this one was." [10] (Emphasis supplied)

However, in 1957 the same court decided Seaton v. The Texas Company [11] in which it had occasion to consider the question of whether or not the Secretary had the power to order cancellation of a prior lease on the grounds the lease was

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7. Brief for Appellee, p. 16, Boesche's Administrator v. Udall, Civ. No. 16,238, (D.C. Cir., April 16, 1961)
8. 50 F. 2d 1070 (D.C. Cir. 1931)
9. 226 F. 2d 35 (D.C. Cir. 1955)
10. Id at 47
11. Seaton v. The Texas Company, Civil No. 13636 (D.C. Cir., October 3, 1957)(Withdrawn). See note 13 infra. The opinion is set forth in full in Appendix I.

issued under the wrong statute. In the first opinion, which the court later withdrew, and which was never published, the court equated the issuance of an oil and gas lease to the issuance of a patent and held that the lease could only be cancelled through judicial proceedings. The Wahlenmaier case was distinguished on the grounds that cancellation in that case was ordered by the court and the Secretary was merely carrying out the order of the court. [12] When the court issued its published opinion it merely held that the action of the Secretary was not "valid administrative action." In the disposition of the case the court said:

> "If the cancellation of the Dorough lease was not permissible under the principles laid down in the land patent cases is should be set aside. If cancellation was not permissible as valid administrative action of the Secretary it should be set aside. We think it was not valid administrative action. This makes it unnecessary to cope with the applicability of the land patent cases, and we accordingly withdraw our opinion of October 3, 1957." [13]

Clearly, the court did not retreat from the position it took in the withdrawn opinion. Rather it decided the case on alternative grounds which avoided the larger issue.

This was the status of the law when Pan American Petroleum Corp. v. Pierson [14] was decided. That case met the

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12. Id at 7
13. Seaton v. The Texas Company, 256 F.2d 718,721 (D.C. Cir. 1958)
14. See note 1 supra

issue head-on and, like the withdrawn opinion in The Texas Company [15] case, equated the issuance of a lease to the issuance of a land patent.

It would appear the Secretary might have become a bit reluctant to attempt to exercise this alleged power in view of these interpretations of his position under the Leasing Act, especially after the Supreme Court's refusal of certiorari in the Pan American case. Such has not been the case, however. He is now asserting the power in Boesche's Administrator v. Udall [16] to cancel a lease which was issued in violation of a mere Secretarial regulation for convenient administration of his duties under the Leasing Act, which required an offer to lease lands on a noncompetitive basis to include all surrounding land available for leasing, if such available lands cover less than 640 acres. [17]

The foregoing cases will later be examined in detail, but as above stated suffice for the purpose of framing the issues which currently exist. It is the purpose of this paper to explore the problem in terms of the statutory history of the Leasing Act and the decisions involving reference to the land patent cases, two of which have considered those cases analogous precedents so far as the

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15. See note 11 supra
16. See note 7 supra
17. 43 CFR 192.42(d) (Supp 1960)

oil and gas lease is concerned. Some inquiry will also be made into the nature of the oil and gas lease in determining the validity of the land patent analogy, as well as into the administrative law problem which of necessity is connected with this inquiry.

I

HISTORICAL BACKGROUND

An understanding of the present requires some examination of the past, and a brief review of the development of laws governing disposal of mineral resources on the public lands is essential to an understanding of the underlying philosophy of the recent cases which have equated the issuance of a mineral lease to the issuance of a fee patent.

The problem of orderly disposal of these mineral resources appears to have been first considered by the Continental Congress in 1785, and at that time an "Ordinance For Ascertaining the Mode of Disposing of Lands in the Western Territory" was passed which provided for sale of the land with a reservation of one third of all "gold, silver, copper, and lead mined, to be sold, or otherwise disposed of by Congress. . . ." [18] It does not appear that any lands were ever sold under authority of this law and it lost its validity upon dissolution of the Continental Congress.

After the American Revolution the vast territory of the West was viewed as a possible source of funds for payment of

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18. Ordinance of May 20, 1785, 28 J. Cont. Cong. 375

the war debts, and various plans for sale of the lands, including the mineral resources therein, were proposed. Each plan met with disappointing results and by 1830 Congress had virtually abandoned any thought of raising revenue by sale of the lands and adopted a policy of encouraging settlement thereon. [19] During this period, however, some copper lands were disposed of in the Great Lakes Region, and for a short period after discovery of lead in Missouri in 1807, a leasing program was substituted for outright sale. [20] The leasing program was a failure because the cost of its administration amounted to more than the royalty collected by the government. In 1829 Congress returned to the policy of sale to the highest bidder and authorized the sale of lands leased for mineral development. [21]

Between 1829 and 1866 the idea of extracting royalties from miners was dying a slow death and was finally abandoned with enactment of the Mining Law of 1866. [22] By the provisions of this Act the public lands were thrown open to mineral exploration and development. The locator was given some assurance of legal protection for his claim, and it was possible to acquire title to the land in fee simple by "occupying and improving" the premises and expending not

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19. American Law of Mining, Vol. 1, p. 8 § 1.4 (1960)
20. Act of March 3, 1829, 4 Stat. 364
21. Op. cit. supra note 19 at 9
22. Act of July 26, 1866, 14 Stat 251, Rev. Stat. 2319, 30 U.S.C. § 22 (1958)

less than one thousand dollars in labor and improvements. [23] This has remained the basic policy except for lands considered prospectively valuable for "coal, phosphate, sodium, potassium, oil, oil shale, gas, sulphur and potash," which are subject to disposal by lease pursuant to the provisions of the Leasing Act [24] or the Mineral Leasing Act for Acquired Lands, [25] depending upon their classification.

Oil and gas were not specifically covered by either the 1866 Act, [26] the Placer Mining Law, [27] or the Mineral Location Law of 1872, [28] and there was considerable uncertainty as to whether oil land was locatable under the placer law. Although the first patent on oil land was apparently issued in the Los Angeles area in 1880, [29] as late as 1883 the Secretary of the Interior considered its application to oil lands to be questionable. [30] He did, however, rule in favor of patenting these lands under the placer law in 1885 and again in 1897, overruling a decision to the contrary by local land officials against the Union

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23. Ibid
24. 30 U.S.C. § 181 (1958)
25. Act of August 7, 1947, 61 Stat. 913, 30 U.S.C. §§ 351-359 (1958). (hereinafter called the Acquired Lands Act)
26. See note 22 supra
27. Act of July 9, 1870, 16 Stat. 217, 30 U.S.C. § 52 (1958)
28. In 1872 the Acts of 1866 and 1870 were republished as a single statute called the Mineral Location Law. 17 Stat. 91, 30 U.S.C. § 21 (1958)
29. Op. cit. supra note 19 at 58
30. Ibid

Oil Company. [31] The initial decision against application of the placer law was enough to cause the oil operators of the West to seek Congressional relief from the fluctuating decisions of the Land Department. [32] Their efforts were successful, and by the Act of February 11, 1897, [33] it was specifically provided that ". . .lands containing petroleum or other mineral oils, and chiefly valuable therefor, . . ." might be entered and patented under provisions of the law relating to placer mineral claims.

Under the placer law, the prospector went upon the premises, conducted his explorations, satisfied himself that the lands were valuable for oil and/or gas by discovery, and thereafter made his claim to the location. Placer claims located by a single individual based upon a single discovery were limited to twenty acres, although an association of individuals could locate up to one hundred sixty acres so long as no person held more than twenty acres. A discovery was required within the limits of the claim before the entry could proceed to patent and pass the fee. Generally, the requirements of the statute were satisfied if the discovery was considered sufficiently promising to justify expenditure

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31. Union Oil Company, 23 L.D. 222 (1896), overruled by Union Oil Company, 25 L.D. 351 (1897). See also Union Oil Company v. Smith, 249 U.S. 337, 345 (1918)
32. The name of the Land Department was changed to Bureau of Land Management by Reorganization Plan No. 3 of 1946, Part IV, § 403, 5 U.S.C. § 133y (1958)
33. Act of February 11, 1897, 29 Stat. 526

of money, labor and materials by a reasonably prudent operator in development of the property and extraction of the minerals.[34] After discovery the prospector could apply to the proper land office for a patent and, upon its issuance, receive title to the lands in fee simple.[35]

The problems flowing from this policy were numerous, and proved the placer law to be inadequate so far as oil and/or gas locations were concerned. The first objection was that the fee title carried the entire estate out of the United States and prevented the government from receiving any future income from production of the minerals, and this attitude seemed to persist in spite of the failure of prior programs.[36] Also, the burden of making a discovery was a difficult one for the prospector due to the enormous expenditure of money involved and the great depth of drilling required. The courts held that the location was not perfected until actual discovery was made[37] and this put the oil prospector at somewhat of a disadvantage in protecting his claim while working toward a discovery.

To clearly understand the problem, it must be remembered that at the turn of the century a prospector was limited to

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34. Chrisman v. Miller, 197 U.S. 313, 322-323 (1905); Cascaden v. Bartolis, 162 F. 267(9th Cir. 1908); Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425 (1912)
35. 30 U.S.C. § 29 (1958)
36. Op. cit. supra note 19 at 9
37. Chrisman v. Miller, 140 Cal. 440, 73 Pac. 1083, aff'd., 197 U.S. 313 (1905); Olive Land & Development Co. v. Olmstead, 103 Fed. 568 (S.D. Cal. 1900); Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673 (1889)

twenty acres in each claim made, and in order to obtain the maximum statutory amount it was necessary for him to associate with seven other individuals, establish the claim, and then obtain a conveyance to him of the associates' interests. This restriction did not preclude the purchase and subsequent patenting of additional claims, nor did it preclude the making of additional claims by the prospector himself or in association with others. But if the prospector desired to obtain such additional claims and block out an area for oil and gas development, he was faced with the problem of working toward a discovery on all claims simultaneously in order to protect them from settlement by someone else. [38]

When Congress passed the Five Claims Act of 1903, [39] it was interpreted to mean that development on any one of five tracts, so long as they were contiguous, would fulfill the statutory requirements as to the other four. It became the practice to acquire five claims in an area, lying contiguous to each other, overlying the same geological structure. Since the claims would almost invariably contain the maximum allowable acreage, their acquisition would allow the operator to block out a total of 800 acres for development purposes.

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38. Union Oil Company v. Smith, 166 Call. 217, 135 Pac. 966, aff'd., 249 U.S. 337 (1919)
39. The Act of February 12, 1903, 32 Stat. 825, provided ". . . that where oil lands are located . . . as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all . . . (if) said labor will tend to the development or to determine the oil bearing character of such contiguous claims."

Drilling operations would be confined to the tract considered to be the most favorably located geologically, and if production was obtained the operator would use that fact as a basis for claiming the proof of the oil bearing character of the tract drilled also proved the oil bearing character of the contiguous tracts on the same structure, and met the statutory requirement of discovery thereon. Moreover, it was thought that the Act abolished the requirement of continuous occupancy of each claim while working toward a discovery on a contiguous tract which was claimed by the same person or corporation.

The decision in Union Oil Company v. Smith [40] was a severe blow to that interpretation of the statute. In that case Union Oil Company acquired five claims in California, one of which had been made in 1883 by Richard Gird and seven associates. After the claim was made the associates conveyed their interest to Gird, and by mesne conveyances it was eventually acquired by Union Oil Company. This claim, known as the "Rawley" claim, was unoccupied, and Union Oil made no effort to occupy it. No discovery had ever been made on the claim nor had any effort ever been made to explore for oil or gas. Immediately adjoining the south half of the Rawley claim was the "Sampson" claim, consisting of 160 acres, also owned by Union Oil Company.

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40. See note 38 supra

Union entered upon the Sampson claim and began drilling operations, expending several thousand dollars in the process. While these drilling operations were in progress, Smith entered upon the Rawley claim, re-marked the boundary, re-named it the "Schley" claim and shortly thereafter began drilling operations thereon. Some forty-eight days later he filed a quiet title action against Union Oil Company. Union defended on the ground that the lands were situated on the same geologic structure, and that under the Five Claims Act, supra, it could hold all five claims so long as drilling operations were being diligently pursued on a contiguous tract.

The court didn't agree. It held that the statute spoke of "annual assessment for labor" upon the tracts claimed, and that this had always referred to labor performed after discovery. [41] Since there had been no discovery on the Rawley claim, the court said Union could not hold it by a discovery on the Sampson claim, even if drilling operations then in progress were successful. [42] It was also held that occupancy of the Sampson claim would not satisfy the occupancy requirement as to the other claims, and Smith thus had a perfect right to enter and begin operations.

Despite these problems, however, the oil lands of the West passed rapidly into the hands of private owners. In 1909 the Director of Geological Survey advised the Secretary of the Interior that lands prospectively valuable for oil and gas

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41. 135 Pac. at 969
42. Ibid

were leaving the public domain so fast that the ". . .government will be obliged to repurchase the oil that it has practically given away. . . ."[43] President Taft, taking a cue from President Roosevelt's action in withdrawing huge portions of land for forest reserves,[44] withdrew all public lands from location and settlement which were considered valuable for their oil and gas deposits.[45] There was no statutory authorization for this withdrawal and even Taft himself must have had some qualms as to the Constitutionality of his action, because he implored Congress in 1910 to affirm his withdrawal and authorize the Secretary of Interior to make future withdrawals to meet emergencies "of this type."[46]

From 1910 to passage of the Leasing Act[47] no program existed for orderly exploration and development of mineral resources on the public lands. During this period the Congress wrestled with the issue of disposal of these mineral resources. Some members favored outright transfer to the states; others advocated a system of government supervised exploration and

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43. United States v. Midwest Oil Company, 236 U.S.459, 466-467(1915)
44. See Forest Reserve Act, 26 Stat. 1103 (1891), 16 U.S.C. § 471 (1958)
45. The withdrawals covered an estimated 3,041,000 acres of "proven oil lands" in California and Wyoming. See 236 U.S. at 467
46. 45 Cong. Rec. 621-622(1910). The power was given the President to withdraw lands "temporarily" by the Pickett Act, 36 Stat. 847 (1910), 43 U.S.C.A. §§ 141-143. The Secretary of the Interior now holds the power to withdraw lands under authority of Executive Order No. 10355 (1952), 17 Fed. Reg. 4831. See also 57 I.D. 331,332 (1941)
47. 30 U.S.C. §§ 181-287 (1958)

development, but even within this faction there seemed to be no firm agreement as to whether it should be accomplished under a leasing system, a sale, or a combination of the two. And all the while the conservationists were arguing that overproduction made any program of immediate development unnecessary.[48]

World War I, perhaps more than any other factor, brought home the realization that orderly development of mineral resources on the public lands was not only desirable but necessary. Prior to the war nearly all the potash used in the manufacture of explosives was imported from Germany,[49] and with the war this supply was cut off. In 1917 an act was passed providing for leasing of public lands for the purpose of mining this mineral.[50] Moreover, it was the first war in history which required petroleum products in quantity for its successful prosecution and laid bare the fact that any future conflict would undoubtedly place demands on the petroleum industry which would dwarf those of the past. The population was growing and would soon demand more petroleum products for civilian consumption. The country was reportedly short five million barrels of crude oil on June 1, 1919,[51] This shortage appeared astronomical at the time but today seems

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48. Op. cit. supra note 19 at 84
49. Op. cit. supra note 19 at 58
50. Act of October 2, 1917, 40 Stat. 297, repealed by Act of Feb. 7, 1927, c. 66, § 6, 44 Stat. 1057
51. 58 Cong. Rec. 4161 (1920)

relatively insignificant. In 1945, at the end of World War II, annual petroleum production amounted to 1,711,103,000 barrels.[52] At the time there was no real knowledge of conservation technique through scientific development or operation, and no indication of the large deposits shortly to be discovered.[53] All these factors combined presented the possibility of exhaustion of known producing areas, and the only solution then foreseen was to stimulate the search for, and development of, new fields.[54] It was against this background that the various political factions compromised their disagreements and passed the Leasing Act[55] which, with its amendments, governs disposal of mineral resources on the public lands today.

II

THE NEW DISPOSAL SYSTEM

The Leasing Act changed the system of disposal from one of complete alienation of the fee by patent to a leasing system under which only a mineral leasehold passed to the lessee.[56] There was reserved to the United States a royalty payment

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52. Statistical Abstract of the United States, p. 734, Table 822 (1947). The production for Texas alone was reported at 2,642,650 barrels daily for the week ending December 22, 1961. The Dallas Morning News, December 29, 1961, Sec.1, p. 9, col. 2
53. Conservation of Oil and Gas, A Legal History, 623 (Murphy ed. 1948) Mineral Law Section, American Bar Association
54. Ibid
55. 41 Stat. 437, as amended, 30 U.S.C. §§ 181--287 (1958)
56. Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 10th Cir. 1960); West v. Work, 11 Fed. 828 (D.C. Cir 1926), cert. denied, 271 U.S. 689 (1926)

from production and a specified rental payment. The Secretary of the Interior was delegated the right to issue prospecting permits which for a period of two years allowed the permittee to enter upon the lands embraced in the permit for the purpose of prospecting for oil and gas. If he made a discovery in paying quantities, he was entitled to a lease, called an "A" lease, covering one-fourth of the lands embraced in the permit, or one hundred sixty acres, whichever was less, at a royalty rate of five per cent.[57] The permittee had the right to select these lands and usually selected those surrounding the discovery well. He also had a preference right to a lease covering three-fourths of the lands remaining in the area included in the permit, called a "B" lease, upon which he paid the United States a royalty from production of not less than 12½ per cent.[58] The Secretary had the right to take the royalty in kind and also the right to provide the maximum royalty, depending upon production, not to exceed 32 per cent.[59] These leases were issued for a primary term of twenty years "with the right of renewal for successive periods of ten years each, under such terms and conditions as the Secretary prescribed."[60]

Section 17 of the Leasing Act[61] provided for disposal of lands situated within the known geologic structure of a

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57. Hoffman, Oil and Gas Leasing On the Public Domain 1 (1951)
58. Ibid
59. Ibid
60. Ibid
61. 41 Stat. 443, as amended, 30 U.S.C. § 226 (1958)

producing oil or gas field on a competitive basis to the "highest responsible qualified bidder" in blocks not exceeding six hundred forty acres, and conditioned upon the payment in advance of an annual rental of one dollar per acre and such bonus as might be acceptable to the Secretary. The minimum royalty rate was established at 12½ per cent, although a higher rate could be set and bids called for on that basis. These leases were also issued for a term of twenty years, with the right in the lessee to renew for successive periods of ten years upon such "reasonable terms and conditions as . . . prescribed by the Secretary of the Interior . . .."[62]

The practice of granting prospecting permits was abolished in 1935 and provision was made for the issuance of a lease called a "noncompetitive lease" on lands not known to be within the geologic structure of a producing oil or gas field.[63] This lease was issued for a primary term of five years "and so long thereafter as oil or gas (was) produced in paying quantities . . .."[64] The Act also provided that the ". . . person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act, . . . shall be entitled to a preference right over others to a lease of such lands without competitive bidding . . .."[65] The royalty rate

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62. Ibid
63. Act of August 21, 1935, 49 Stat. 674, 30 U.S.C. § 221 (1958)
64. Op cit. supra note 57 at 3. The primary term of the noncompetitive lease is now ten years. 30 U.S.C.A. § 226 (e).
65. 30 U.S.C. § 226 (1958)

was changed to a flat 12½ per cent on all production from these leases to bring them in line with prevailing rates in private leasing arrangements by another amendment in 1946.[66]

III

THE ACQUIRED LANDS ACT

Since the Leasing Act[67] provided for leasing of lands in the public domain only, it was not applicable to mineral interests coming into the hands of the government by deed, cession or condemnation. This situation was changed by the Mineral Leasing Act for Acquired Lands,[68] which provided that these lands might be leased under the same terms and conditions as lands in the public domain.[69] Generally speaking, unless the supervising agency indicates current or future use of the lands is incompatible with development of its oil and gas reserves, the lands are available for leasing.

This Act contains several exceptions which should be mentioned. Lands acquired which are situated within villages, towns or incorporated cities, lands within or acquired for national parks or monuments, or for military or naval purposes are not included within its coverage.[70] Also excluded are submerged lands,[71] lands acquired for mineral development by the government

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66. Act of August 8, 1946, c. 916, § 12, 60 Stat. 957, 30 U.S.C. § 226(1958)
67. 30 U.S.C. §§ 181--287 (1958)
68. 30 U.S.C. §§ 351-359 (1958)
69. 30 U.S.C. § 352 (1958)
70. See note 68 supra
71. Submerged lands are leasable under the Submerged Lands Act of 1953, 67 Stat. 462, 43 U.S.C. §§ 1331-1343 (1958)

and lands declared surplus by the government. It does not authorize leasing except for those minerals covered in the Leasing Act.[72]

Neither the Leasing Act nor the Acquired Lands Act govern leasing of Indian Lands. These lands are leasable under entirely different provisions of law, rules and regulations, and the Tribal Council is given certain rights over the disposal procedure.[73] Also, neither of the Acts govern leasing of the Naval Petroleum Reserves.[74]

IV

THE LAND PATENT CASES

At the outset of the inquiry into the power of the Secretary of the Interior to cancel federal oil and gas leases by administrative proceedings, we are met with the language of the courts in the cases of Seaton v. The Texas Company[75] and Pan American Petroleum Corp. v. Pierson[76] which equate the issuance of an oil and gas lease by the Secretary to the issuance of a land patent. In the former case it was

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72. See note 67 supra .
73. 25 U.S.C. §§ 391--415 (1958)
74. The Naval Petroleum Reserves are under the exclusive jurisdiction of the Secretary of the Navy subject to supervisory control by Congress. Act of August 10, 1956, c. 1041, 70A Stat. 457, 10 U.S.C. § 7421 (1958)
75. 256 F. 2d 718 (D.C. Cir. 1958)
76. 284 F.2d 649 (10th Cir. 1960)

clearly stated that if the cancellation was not permissible under the principles of the land patent cases it should be set aside.[77] In deciding in the Pan American case that the Secretary was without power to cancel, by administrative proceedings, an outstanding oil and gas lease allegedly procured through fraud, the Court stated that:

> "It is not necessary to explore the extent of the powers of the Secretary over the public lands. Suffice it to say that prior to the establishment of the lease system for mineral lands, those lands, like other public lands, were subject to disposition by patent and, upon issuance of the patent, administrative control ceased and the patent could be set aside or cancelled only by judicial proceedings in the courts.
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> . . . .
>
> ". . . (T)he government, by issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises. Similarly, the issuance of a patent is the last act of the government in disposing of the non-mineral lands of the public domain. Upon performance of this last act, administrative power to annul or cancel ends and judicial power begins."[78] (Emphasis supplied)

The Texas Company case actually was decided on the lesser ground that the Secretary had exceeded his administrative authority; the Pan American case was decided on the issue of fraud in procurement, but the language employed by these Courts indicates the determination of the legality of the Secretary's action in cancelling outstanding federal oil and gas leases is to be measured by the principles of law

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77. 256 F.2d at 721
78. 284 F.2d at 654

developed under the land patent decisions.

The land patent has been defined as "a muniment of title issued by a government or state for the conveyance of some portion of the public domain."[79] Although one might establish an equitable title to lands in the public domain through compliance with various provisions of law, the legal title remains in the government until passed by patent.[80] Congress, in the exercise of its Constitutional power,[81] has exclusive, plenary and unlimited power to determine the times, conditions and modes of transferring the public lands.[82] The power extends to the prescription of conditions upon its acquisition, and allows Congress to exercise the same powers over, and dealings with, the public lands as a private individual over lands owned by him.[83] The power therefore allows Congress to prescribe by statute what portions of the public lands may be disposed of, the manner in which it shall be done, and what interests may be granted or reserved. Congress also has the power to prescribe the requirements each individual must fulfill in order to receive title to the lands. Thus the entryman, upon satisfaction of certain statutory requirements laid down by

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79. Smelting Co. v. Kemp, 104 U.S. 636 (1881); Black's Law Dictionary, 4th ed 1282
80. United States v. Detroit Timber & Lumber Co., 200 U.S. 321(1906)
81. U.S. Const. art 4 § 3
82. Gibson v. Chouteau, 80 U.S. 92(1871); United States v. Gratiot, 13 U.S. 644(1840)
83. Sinclair v. United States, 279 U.S. 263 (1929)

Congress, becomes entitled to the fee simple title which is thereafter transferred to him in the form of a land patent.[84]

The duty of administering the statutes governing disposal of the public lands and their mineral resources is vested in the Secretary of the Interior,[85] and it becomes his responsibility, or that of his delegatee, to determine the availability of the lands for disposal, the qualifications of individual claimants, and to decide, in contested cases, which claimant has the better right to the patent. When such determination has been made, it is his further duty to perform the act of issuing the patent. If he should refuse to do so, mandamus will lie to force him to deliver it to the person entitled thereto.[86]

Once the patent issues a presumption arises that the act was done in full compliance with the law. That is to say, the Secretary, in the performance of his duty under the mandate of the statute, is presumed to have made all the necessary determinations that the requirements of law have been met prior to issuing the patent. This presumption can be overcome in a direct proceeding in equity to cancel, annul or set aside the patent by a showing of want of jurisdiction in the

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84. Payne v. New Mexico, 255 U.S. 367 (1921)
85. Rev. Stat. 441, 5 U.S.C. § 485 (1958), provides "The Secretary of the Interior is charged with the supervision of public business relating to . . . Public lands, including mines." 30 U.S.C. § 189 (1958), provides that the Secretary of the Interior shall have power "to prescribe necessary and proper rules and regulations and do any and all things necessary" to carry out the purposes of the Act.
86. Lane v. Hoglund, 244 U.S. 174 (1917)

Secretary to dispose of the lands.[87] In this case the patent would be void, but the same limitation would apply in case the patent was merely voidable. The same presumption as to regularity would arise and it would take a direct proceeding in equity to cancel or annul the patent.[88]

It can be seen from the foregoing discussion that the power to weigh the facts and law in connection with the issuance of the patent was expressly vested in the Secretary, but once the instrument issued the power was cut off. He could of course, as suggested by Judge Breitenstein,[89] initiate action through the Attorney General directly against the holder of the instrument to cancel or annul it, but was powerless to act directly against him through his own departmental procedure.

The reason for this rule was expressed in Johnson v. Towsley,[90] one of the early land patent cases. In that case Towsley entered upon a certain tract of land near Omaha, Nebraska on June 15, 1858, made improvements thereon, and

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87. Lake Superior Ship Canal Ry. & Iron Co. v. Cunningham, 155 U.S. 354 (1894); Davis v. Wiebbold, 139 U.S. 507(1891); Stoddard v. Chambers, 15 U.S. 119 (1844). Such a transfer would be void for want of jurisdiction over the subject matter. A patent issued under a mistaken notion of the law going to jurisdiction is void for want of authority, since the action of a government officer is valid only if the act is within the scope of his lawful authority. Morris v. United States, 174 U.S. 196 (1899); Sherman v. Buick, 93 U.S. 209(1876); Leavenworth, L.& G. R.R. v. United States, 92 U.S. 733 (1876)
88. United States v. Winona & St. Peter R.R., 67 F. 948 (8th Cir. 1895)
89. 284 F.2d at 655
90. Johnson v. Towsley, 80 U.S. 72 (1871)

filed a declaration of intent to claim the land. He had previously set up a claim to other lands close by but withdrew his claim thereto in favor of another sometime in June 1859, waiving any further rights to that land. On October 5, 1860, one Johnson also set up a claim to the lands claimed by Towsley, built a small house thereon and enclosed it with a fence.

A controversy between the claimants resulted which was investigated by the local land officers and a decision rendered in favor of Towsley. The Commissioner of the General Land Office affirmed the decision and a patent was issued to Towsley on September 20, 1862. The dispute was appealed to the Secretary of the Interior who overruled the Commissioner on the grounds that Towsley's claim to the other lands disqualified him as to his claim to the lands in dispute. A patent was accordingly issued to Johnson and he entered upon the lands.

Towsley filed a quiet title action in the District Court for Douglass County, Nebraska, which ordered Johnson to convey the land to Towsley. The Supreme Court of Nebraska affirmed the decision[91] and Johnson appealed to the Supreme Court of the United States. In affirming the judgment the Supreme Court said:

> "It is very well known that the officers (of the Land Department) do not confine themselves to determining, before a patent issues, who is entitled to it, but they frequently assume the right, long after the patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it, they issue

91. 1 Neb. 95 (1871)

> "a second . . . . If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights?"[92]

Which patent was treated as the valid instrument is rendered uncertain because, while the subsequent patent was described as a cloud on Towsley's title, the Nebraska District Court ordered it conveyed to Towsley. The quoted language makes it fairly plain, however, that the Supreme Court of the United States considered the first patent valid to effect the transfer of the land, thereby requiring the conclusion that the second patent was void, and no more than a cloud on Towsley's title.

Just six years later, in Moore v. Robbins, the Court crystallized its thinking concerning limitations on the Land Department's power over patents after their issuance in the following language:

> "While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the government . . . with the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course." [93] (Emphasis supplied)

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92. 80 U.S. at 84
93. 96 U.S. 530,532 (1877)

In United States v. Stone the Supreme Court, speaking through Mr. Justice Grier, said:

> "The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgement of a court."[94]

In deciding Smelting Co. v. Kemp the Court expanded upon the language of Moore v. Robbins, supra, and clearly expressed in rather strong terms the presumption of regularity and validity attaching to the grant upon issuance of the patent. It said:

> "A patent, in a court of law, is conclusive to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it had jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts . . . goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed." [95]

There are three possible situations suggested by these cases. First, as in the Towsley case, the patent is valid and carries the title out of the United States. Second, as in the Stone case, the patent is void ab initio for want of jurisdiction, either because its disposal was prohibited by law or because the United States did not have title to the land at the time of the attempted transfer. Third, as suggested by Moore v. Robbins, we have the case in which the patent carries the title out of the United States but for one reason or another is voidable. Clearly, the Secretary is without power

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94. 69 U. S. 525,535 (1865)
95. 104 U.S. 636,646(1881). See also Witbeck v. Hardeman, 51 F.2d 450 (5th Cir. 1931), aff'd., 286 U.S. 444(1932)

under the rules laid down in these cases to cancel or annul the patent instrument by his own fiat, be it valid, voidable or void. He must go into court in a direct proceeding in equity to accomplish that result. So too must private parties contesting their title claims in the event that the contest takes the form of litigation between claimants in which the Secretary is not involved.

A moment's reflection on the matter demonstrates the wisdom of the view, and the inappropriateness of purported administrative cancellation of even void instruments. For example, suppose that a certain section of land is not available for disposal by the Bureau of Land Management, because of prior reservation, appropriation to other uses by the government, or because the government does not have title to the land, but nevertheless a patent is issued purporting to transfer the land. The instrument would not carry title out of the United States into the purported patentee. The act is a mere nullity. But suppose the lands were thereafter made available for disposal and were legally patented. Two patents are now outstanding on the same land--one void ab initio and the other valid. The Secretary now decides to cancel the patent he considers void and does so administratively. If the holder refuses to surrender it for cancellation--and the Secretary has no power as has a court to compel its surrender--the attempted cancellation is without the desired effect. The cloud upon the true patentee's title would remain.

It would still take the action of a court to clear the title by adjudicating the clouding instrument void. This appears to be the premise upon which Mr. Justice Grier postulated his views in the Stone case, supra. This is not to suggest, of course, that the Secretary cannot, in a clear case, treat an obviously void patent as a nullity; only that he cannot adjudicate its status in his own departmental determination.

Considerably different in possible consequences is the situation wherein the patent is voidable instead of void. This was the problem in United States v. Winona & St. Peter R. R.[96] There certain lands were certified to the State of Minnesota for the purpose of aiding in the construction of railroads. The railroads were to receive alternate sections of land along the line when it became definitely fixed. When the map thereof was filed with the proper authorities, the rights of the railroad attached to those sections. Lands to which preemption or homestead rights had already attached were excluded from the grant, and in lieu thereof the railroads were permitted to claim other lands up to a specified distance from the line, as it appeared on the plat, from available public domain lands contained therein.[97] Certain preemption filings and homestead entry rights had attached prior to final location of the line by Winona. The Secretary of the Interior proceeded to cancel these filings and entries

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96. 67 F. 948 (8th Cir. 1895)
97. 67 F. at 949

by Departmental action and the railroad ultimately received title to the lands.

Some thirteen to eighteen years later the United States discovered its error in cancelling these filings and entries and brought suit to set aside the conveyance to the railroad. During the intervening years the railroad had conveyed title to various purchasers who bought the land without knowledge that the Land Department was in error in making the cancellations. The Court refused to set aside the conveyance.

The reasoning behind the decision was that the Land Department had jurisdiction over the lands, since patents had not gone out to the preemptors and homesteaders at the time of certification of the lands to the State. The filings and entries did not operate to take the legal title out of the government. And even though the statute excluded them, their rights were cut off by the erroneous action of the Land Department in passing the lands to the State for the railroad. Moreover, even though the grant might have once been subject to attack, the rights of bona fide purchasers had intervened and this in and of itself was a complete bar to the government's suit.

Carrying the analysis a step further, in the case of voidable patents, neither party is left without a remedy. If the patent should have gone to applicant A because of prior right but instead was issued to applicant B, a court of equity in a proper proceeding can impress a trust in favor of A and

compel B to convey the property to him.[98] The rule was clearly expressed in Johnson v. Towsley:

> "And . . .if . . . the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, a court of equity will . . . convert him into a trustee of the true owner, and compel him to convey the legal title." [99]

Moreover, even though the grant was initially voidable, a court can weigh the equities which since may have attached, such as costly improvements installed by B, and refuse to impress the trust, or, in a direct proceeding by the Secretary, refuse to decree a cancellation of the voidable patent, the while framing its decree as necessary to compel B to do what an equitable disposition requires. Certainly the Secretary is without the power of a court of equity to do such a thing, and moreover is at least a potential litigant in such situations which is further reason for barring him from performing any such function by administrative procedures. Once this is realized, the reason for the courts' insistence upon judicial proceedings when a patent has issued can scarcely be denied, for in no other way can there be the degree of certainty of title which is essential to property ownership and property transactions.

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98. Cohen v. Fall, 284 F. 734 (1922); Hodge v. McCall, 185 Cal. 330, 197 Pac. 86 (1921); Bond v. Walters, 38 Cal. App. 245, 175 Pac. 909 (1918)
99. 80 U.S. at 85, citing Stark v. Starr, 73 U.S. 402, 419 (1867)

A consideration and analysis of the land patent cases provides us with a set of principles from which we can proceed to fashion a test for determining the limitations upon the action of the Bureau of Land Management in connection with an outstanding patent. The first consideration is whether or not the Bureau had jurisdiction over the lands. If it didn't, then there was no power of disposition and the act was void, though not subject to adjudication as such by the Secretary's departmental procedures. Second, if it did have jurisdiction then the power was also present to determine the claims of applicants and, upon reaching such a determination, to perform the final act of issuing the patent. Whether the action was right or wrong is of no moment, the act carried the title out of the United States

In considering the land patent cases it must be kept in mind that we are dealing with the passage of a fee title, sometimes with the mineral interests reserved to the United States in the instrument itself, as in the railroad grants,[100] rather than a lease conveying all or part of the mineral interest out of the government. The matter becomes important as the Secretary contends that the retention of legal title to the fee removes the mineral leases from the rules applicable to the land patent cases, a contention which is later considered.

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100. For example, see Act of July 1, 1862, 12 Stat. 489, amended by the Acts of July 2, 1864, 13 Stat. 356, and the Act of July 3, 1866, 14 Stat. 79, granting certain lands to the Union Pacific R. R. and its branches. See also United States v. Northern Pacific R.R., 176 F. 706, 707 (9th Cir. 1910), appeal dismissed, 223 U.S. 746 (1912)

The cases previously discussed are by no means all of the land patent decisions which deal with the issue of governmental power to annul or cancel the patent after issuance by administrative action, but they are the leading cases. It appears quite obvious from the language of those opinions that the courts considered the administrative power at an end upon issuance of the patent. As Judge Brietenstein put it:

> "Upon performance of this act, administrative power to annul or cancel ends and judicial power begins." [101]

V

THE FEDERAL OIL AND GAS LEASE

Ignoring for the purposes of this inquiry the restrictions conservation authorities may place upon production and sale of the oil and gas that may be taken from a particular tract of land, the owner thereof has the unlimited right to produce and dispose of oil and gas taken from wells located on his property. And with this right to dispose of these products exists the correspondent right to prevent others from utilizing his property for the purposes of prospecting for or producing them.

Today, few landowners attempt to produce the oil and gas underlying their lands themselves. Instead, the right to develop the property is usually granted to another, with the landowner reserving unto himself a share of the production free of cost, called a "royalty," through the use of an instrument

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101. 284 F. 2d at 654

known as an "oil and gas lease." By the terms of this instrument the landowner grants to the lessee the exclusive right to go upon the property for the purpose of exploring for oil and gas, producing these minerals if found, and to dispose of them. Under the terms of the typical lease, the landowner now has a royalty interest and the lessee has what is known as a working interest in the minerals. The term of this agreement is usually for a stated term of years, called a primary term, and so long thereafter as oil and/or gas are produced in paying quantities.[102]

The relationship here is not the same as that of landlord and tenant under a common law lease of land. In Louisiana, because of that state's civil heritage, an oil and gas lease is deemed to be in the same category as an agricultural lease, but by statute is declared to be an interest in the land itself.[103] Though there may be considerable diversity of opinion as to whether the lease is real or personal property, it is elsewhere generally agreed that the lease does create an interest in the land itself.

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102. The term "'paying quantities' requires a comparison of net revenues from the lease as it was originally executed without exclusion of overriding royalties and production payments created therefrom. Costs of a capital nature, such as exploration, drilling, and equipment, are not considered. Thus, the test involves matching current expenses (exclusive of depreciation, depletion, and amortization) against current revenues." Galvin, Developing An Oil and Gas Jurisprudence In Michigan, 7 Wayne L. Rev. 426 (1961)(Citations Omitted)

103. Lilly v. Conservation Commissioner, 29 F. Supp. 892 (E.D. La. 1939); Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207(1920). See Nabors, The Louisian Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisian State Law Institute, 25 Tul. L. Rev. 30 (1951), 26 Tul L. Rev. 23 (1952). See Acts 1956 § 432, LARS 9:1105.

Typically, the government in the role of landowner leases its lands for development of oil and gas resources in a leasing transaction of usual form, retaining a royalty payable from production,[104] with the working interest passing to the leasee upon execution of the lease. It is the practice of seeking to extinguish this latter interest by administrative action with which we are here concerned.

A comparison of the language in the granting clause of the federal oil and gas lease with that of the typical form lease used in private transactions shows no basis for substantial difference in the nature of the interest granted. The federal lease provides:

> "Section 1. Rights of the lessee. -- The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in the lands leased, together with the right to construct and maintain thereupon, all works, lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof. . . ." [105]

The typical "Producers 88" form lease provides:

> ". ... the lessor. . . does grant, demise, lease and let exclusively unto said lessee, with the exclusive right of mining, exploring by geophysical and other methods and operating for and producing therefrom oil and all gas of whatsoever nature or kind, and laying pipe lines, telephone and telegraph lines, housing and boarding employees, building tanks, power stations, gasoline plants, ponds, roadways, and structures thereon to produce, save, market and take care of said products

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104. The Government leasing form is set forth in full in Appendix II. See also Malone, Oil and Gas Leases on United States Govemment Lands, 2d Ann. Inst. on Oil and Gas Law and Taxation 309-318, S. W. Legal Foundation (1951).
105. Ibid

> and the exclusive surface and sub-surface rights and privileges related in any manner to any and all such operations and any and all other rights and privileges necessary, incident to, or convenient for the economical operation. . . ." [106]

In both cases the lessee is granted the exclusive right to go upon the land, drill for and produce the oil and gas underlying the land and dispose of the products by sale or otherwise. He is granted the right in addition to do any and all things necessary to accomplish the purposes of the lease, and so much of the surface of the land as is required for the enjoyment of his estate may be occupied to the exclusion of the surface owner.

Exactly what legal interest the lessee has acquired under the lease has been considered by many courts and has produced considerable discussion by various authors.[107] In Texas the landowner is considered to have title to the minerals in place beneath his land, and by a grant of either the surface or the minerals, with a reservation of the other, a horizontal severance of the property is effected and two separate and distinct estates are created. These two estates are considered to be as distinct from each other as if the severance had been vertical rather than horizontal.[108]

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106. The "Producers 88" form lease is set forth in full in Appendix III.
107. 1 Williams & Meyers, Oil and Gas Law 32-45(1959); Walker, Fee Simple Ownership of Oil and Gas in Texas 6 Tex. L. Rev. 125(1928); Walker, Nature of Interests created by an Oil and Gas Lease, 7 Tex.L. Rev. 1(1928); Galvin, op. cit. supra note 102 at 405.
108. Stephens v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290(1923); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296, 302(1923). See also Walker, op. cit. supra note 107.

In other states the theory of ownership of the minerals in place has been denied on the grounds that oil and gas are fugacious in nature and hence incapable of ownership until reduced to possession. It is impossible under this view to create a corporeal estate in the minerals, and hence a lease can create no more than an incorporeal interest which is generally described in the non-ownership states as a profit a prendre.[109]

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109. 1 Williams & Meyers, op. cit. supra note 107. A survey of the decisions of the courts in the non-ownership jurisdictions which have considered the point reveals a remarkable diversity of analysis as to whether an oil and gas lease is real or personal property. In Continental Supply Co. v. Marshall, 152 F.2d 300 (10th Cir. 1945), for example, an oil and gas lease is shown to be personal property for some classifications and real property for others. Regardless of this diversity, however, there is general agreement that the lease does create an interest in land.

The basic rationale underlying the problem of classification under the theories of ownership seems to be the opinion that the migratory nature of the substance of oil and gas renders the subject matter incapable of ownership until reduced to possession on the one hand, and the opposing view that the landowner owns the minerals in place beneath his land. In the early cases the landowner's interest was considered comparable to that in wild animals upon his land and thus not his until possessed. This analogy seems to be erroneous, since the landowner has no property interest in the wild animals on his land and could be denied the privilege of hunting any or all of them. But he cannot be denied the right to take the oil and gas from beneath his land, although the amount and manner of taking may be regulated (Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900). Nevertheless, such concepts have had considerable impact upon the development of the law of oil and gas and have been given vitality by the courts, principally because the various legislatures have not seen fit to provide a definition of the interest which follows a pattern of consistency.

Some jurisdictions use the term "qualified ownership" instead of "non-ownership" in recognition of the correlative rights of owners in the common source of supply. In legal effect the qualified and non-ownership theories are said to be "almost indistinguishable." Galvin, op. cit. supra note 102, at 405, n. 10.

No cases have been found in which the interests created under the federal oil and gas lease have been defined, but the opinion of the United States Supreme Court in British-American Oil Producing Company v. Board of Equalization of the State of Montana[110] indicates a carved out mineral interest is a distinct and separate estate in the minerals. That case came to the Court from the Supreme Court of Montana[111] on the issue of whether or not the State of Montana could levy gross production and net proceeds taxes on oil production from trust lands held by the United States for the benefit of the Blackfeet Indians. In disposing of the case the Court said:

> ". . . a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land. . . ."[112] (Emphasis supplied)

The language would seem to indicate that the Court was of the opinion a separate corporeal estate could be created in the minerals in place by reservation. If this be so, then it would appear that an oil and gas lease on federal land might also operate as a horizontal severance of the surface and mineral interests and allow the creation of two separate and distinct estates under the same theory as employed by the Texas courts.[113] But even if the non-possessory analysis be the foundation for

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110. 299 U.S. 159 (1936)
111. 101 Mont. 293, 54 P.2d 129(1935)
112. 299 U.S. at 164-165
113. See note 108 supra

measuring the property transfer effects of the federal oil and gas lease, all states not adhering to the Texas theory, including Louisiana which is not a common law state, acknowledge that at least an incorporeal interest in land, which is property, has been conveyed.

Presumably, when the question must be faced, the courts dealing with federal rights and obligations will be guided by one of the two common law concepts. If that postulate is valid, then there should be no difference in the property relationship created by the federal oil and gas lease and the lease commonly used by private citizens unless the statute requires a different result. The rights granted to the lessee are substantially the same and so are his obligations. The royalty paid to the government may be said to be generally the same as that commonly paid in comparable private leasing arrangements. It does not appear the Leasing Act[114] would in any way require a different relationship. The most remarkable difference seems to be in the identity of the lessor. Of course there may be differences in the primary terms of the leases, but this does not alter the relationship. Both provide for a determinable fee, be it possessory or non-possessory, consisting of a primary term of a specified number of years and so long thereafter as oil and/or gas are produced in paying quantities.[115]

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114. 30 U.S.C. §§ 181-287(1958)
115. See note 102 supra

In its brief to the Tenth Circuit in Pan American Petroleum Corp. v. Pierson the government states:

> "In simple words this concept of an oil and gas lease makes it similar to a lease of land for growing crops, where the rental in whole or in part is a portion of the crops."[116]

And further that:

> "An oil and gas lease is commonly considered a profit a prendre rather than as an estate in land."[117]

Here, the government relies upon the cases of Burnett v. Harmel[118] and Group No. 1 Oil Co. v. Bass,[119] from which the foregoing language is quoted, in support of this proposition. Both of these cases involved tax questions and are therefore poor authority for support of any concept of interests created by an oil and gas lease except for the purpose of resolving the tax question then before the court. The Burnett case involved the question of whether or not bonus payments under an oil and gas lease were taxable as capital gains; Group No. 1 Oil Co. v. Bass involved the question of whether or not income received from production of oil and gas on state land, under a lease from the State of Texas, was taxable to the lessee. In the Burnett case the court did say:

> "By virtue of the lease, the lessee acquires the privilege of exploiting the land for the production of oil and gas for a prescribed period; he may explore, drill, and produce oil and gas found.

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116. Brief for Appellee, p. 35, Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir 1960)
117. Ibid . . 37 (1931)
118. 287 U.S. 103(1932)
119. 283 U.S. 279(1931)

> Such operations with respect to a mine have been said to resemble a manufacturing business carried on by the use of the soil. . . rather than a sale of the land or of any interest in it or in its mineral content." [120] (Emphasis supplied)

All the court held in that case was that an oil and gas lease could not be considered a sale of a capital asset, under the terms of the tax statute, for capital gains purposes. It is of course elementary that the courts ignore local property concepts and construe tax statutes in a uniform manner consistent with the scheme for collection of revenue in order that the system may operate upon a uniform basis of application. A consideration of the above cases illustrates the point.

The government's contention that the lease should be "considered a profit a prendre rather than an estate in land", and therefore analogous to an agricultural lease, is difficult to understand. A profit a prendre is an interest in land which fails to be an estate only because it is non-possessory (incorporeal) in nature. It was so recognized at common law, and the weight of authority does not suggest that the interest should be treated differently in connection with oil and gas leases, the determinable fees of which in non-ownership states depend upon the profit a prendre in the oil and gas of the landowner.

The history of the Leasing Act[121] seems to indicate that the framers did not legislate in derogation of the common law concept of the oil and gas lease and would allow it to be

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120. 287 U.S. at 107
121. See note 114 supra

cancelled only by judicial proceedings. In this connection Senator Lenroot said:

> ". . . the Secretary of the Interior has no right or authority under the bill to cancel a lease. It can only be canceled by judicial procedure and a forfeiture." [122]

Mr. Anderson further spoke of "interests held"[123] under the lease, and that the ". . . resources once passing out of the hands of the United States under a lease granted under (the) act are no longer subject to the legislative action of Congress."[124] It seems clear it was expected that an interest in the land itself would pass to the lessee upon issuance of the lease.

Even assuming arguendo that under the federal oil and gas lease the relationship of the parties is purely contractual, without the passage of any interest in or to the land itself, can the sovereign repudiate the contract? The cases indicate that it makes no difference in matters of contract that one party is the sovereign and the other a private citizen. It has long been held that when the United States enters into a contract with one of its citizens, its rights and duties are governed by the law applicable to contracts between private individuals. Valid contracts are property, and as such are protected against governmental action seeking to take away that property without compensation. Once the right vests, the sovereign has no right to invalidate it unless its action

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122. 58 Cong. Rec. 4169(1920)
123. Id at 7604
124. Id at 7643

comes within some provision of the Constitution allowing it.[125]

The Supreme Court of the United States has observed that:

> "If they (the United States) repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. . ..
>
> . . . .
>
> "(Congress) cannot undo what has already been done, and it cannot unmake contracts that have already been made. . .."[126]

From what has been said, it seems reasonable to conclude that a federal oil and gas lease does pass an interest in land, an interest that vests upon execution of the lease. If this be so, there is no legal difference in status of the title to an interest created by lease and that created by patent. In both cases whatever rights the government had pass upon execution of the instrument creating the interest, and the fact that the government retains the fee title to the surface estate, which carries with it a possibility of reverter in the determinable mineral fee granted, does not detract from the right to protection of the granted interest.

Even if the relationship were purely contractual, it is to be doubted that the government could unilaterally repudiate the contract and destroy the rights created thereby without limitation. A private citizen could not do so and there is no good reason why such a right should impliedly be granted to the government. If a different relationship were considered

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125. Lynch v. United States, 292 U.S. 571(1934); Calhoun v. Massie, 253 U.S. 170 (1920); Hoke v. United States, 227 U.S. 308(1913); Champion v. Ames, 188 U.S. 321 (1903).
126. Central Pacific R.R. v. Gallantin, 99 U.S. 700, 719-721(1879)

desirable, there is no reason why it should not be provided for by contract at the time the lands are leased. But Congress has so far failed to provide authority for such a contractual provision within its delegation of power to the Secretary, and if it is to be found it must be implied. As Judge Fahy so appropriately stated in The Texas Company[127] case, "the relevant considerations weigh against implying the power."

VI

THE SECRETARY'S STATUTORY POWERS

Considerable power over the public lands has been delegated to the Secretary of Interior. Under the Leasing Act he is specifically authorized to issue such regulations as necessary to effect the purposes of the Act.[128] But his powers here rise no higher than necessary to accomplish the purposes of disposal envisioned by the statute. It is significant to observe that the statute itself clearly limits his power to cancel the lease once it is executed. The difficulty here is that the Secretary apparently does not consider himself bound by the provisions of the statute which grant the power.

The reason for this position is premised upon a delegation of responsibility in 5 U.S.C. § 485, which provides that the Secretary is charged with:

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127. See Appendix I
128. 30 U.S.C. § 189 (1958)

". . . the suprevision of public business relating to . . . public lands, including mines."

It is apparent that the Secretary considers this provision of law to grant him an almost limitless reservoir of power upon which he can draw to cancel leases issued under the provisions of the Leasing Act, whether or not the Act itself gives him any such power.

Such a construction of the statute was unknown to the Sixty-Sixth Congress when the Leasing Act was being considered. The history of the Act unequivocally shows that the power to cancel a lease was not only to be limited, but denied altogether except through judicial proceedings. In discussing the matter Senator Lenroot said:

> "I should like to remind both Senators (Smoot and McKellar) that the Secretary of the Interior has no right or authority under the bill to cancel a lease. It can only be canceled by judicial proceedings and a forfeiture. . . ."[129] (Emphasis supplied)

The Congressional Record further shows that Mr. Anderson attempted to insert a provision for cancellation and forfeiture without court proceedings in cases of fraud:

> "Mr. Anderson: Mr. Chairman, I move to strike out the last word. I want to ask the Chairman of the Committee a question. The provision beginning on line 6, page 6 provides:
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> 'any interests held in violation of this act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General' and so forth.

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129. 58 Cong. Rec. 4169(1920)

I take it that under that language the holding is valid and any operations conducted under it would be valid until after action brought by the United States. Am I correct in my construction of the language?

Mr. Sinnott: That would relate to a lease, but not to a permit. The secretary has certain rights under a permit, but after the permit is merged into a lease, then it will take court action.

Mr. Anderson: Well, Mr. Chairman, I want to ask what was the reason for that sort of provision? Ordinarily a lease would be void ab initio, but here you put the entire burden on the government to proceed to forfeit the lease before anything can be done in the way of showing fraud.

Mr. Sinnott: It is in recognition of that legal, or equitable principle that the law abhors a forfeiture, and there must be a showing made in court before the forfeiture can be secured.

. . .

Mr. Sinnott: . . .it is in line with all court proceedings in relation to forfeiture."[130]
(Emphasis supplied)

Mr. Anderson's motion was defeated, and the Act as passed provided for cancellation of prospecting permits by the Secretary for want of diligence on the part of the permittee in prosecution of prospecting operations in accordance with the terms of the permit. No provision was made for cancellation of leases by the Secretary under any circumstances except through court proceedings instituted by the Attorney General. Thus it can be seen that at the time of passage of the Act the framers were purposely limiting the power of the Secretary to the area of determination prior to issuance of the lease. It can properly be assumed that Mr. Sinnott considered the merger of the permit into a lease to divest the Secretary of his power

130. Id at 7604

over the leased premises. His control at that point would be cut off, leaving any further proceedings affecting title to the judiciary.

The Secretary counters with the argument that under the provisions of 5 U.S.C. § 485 he is charged with the "supervision" over the public lands, and that under this broad grant of power he has the power to do all things connected with these lands, including the cancelling of outstanding leases, at any time unless a fee patent has passed. He further contends that this general power was not repealed or limited by the Leasing Act;[131] that its provisions do not require court proceedings, but rather provide that court cancellation is only an alternative remedy. In short, his position is that he may repair to the courts or to himself for relief as he chooses.[132]

In addition to the incredible concept that an administrative officer shares judicial power with the courts--in fact controls whether a matter shall be heard by a court or himself--this contention must fail for another reason. Under the general grant of supervisory power, it must be assumed the Congress intended the word "supervision" to convey its commonly accepted meaning or it would have indicated otherwise. The word "supervise" is said to mean "to oversee for direction; to superintend; to inspect with authority" or to "exercise supervision over" a specific act or undertaking.[133] The word

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supervision is defined as the act or occupation

131. See note 114 supra

132. Brief for Appellee, pp. 15-28, Boesche's Administrator v. Udall, Civ. No. 16,238 (D.C. Cir., April 16, 1961)

133. Webster's New International Dictionary, 2d Ed., Unabridged 2533

"supervision" is defined as the "act or occupation of supervising."[134] Such a grant, without more, could scarcely include power to destroy what Congress plainly intended to be vested property rights.

To argue otherwise would be to say that the general grant of power vested in the Secretary exclusive authority over the public lands subject only to specific limitation by subsequent legislation. Such a concept is foreign to our legislative process and contrary to prior and subsequent Congressional action concerning disposal of the public lands. Congress has many times expressed its desire that portions of the public lands be disposed of in various ways for various purposes, and the language of those enactments leave no doubt but that the responsibility delegated under 5 U.S.C. § 485 was intended to do no more than fix responsibility in a Department of the Executive Branch of the government for the purpose of carrying out the legislative intent as to subsequent dispositions of the public lands and general business matters relating thereto.[135]

If such power may be found in this provision of law, it is indeed strange that it escaped the attention of the Secretary of Interior for approximately eighteen years. This is especially significant when it is remembered the Department of Interior took the position in 1930 that cancellation was impossible except through judicial proceedings.[136] But in 1938, in an opinion by the Assistant Secretary of the Interior, the position was takenthat the Department could determine the validity of

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134. Ibid
135. See note 100 supra
136. The Melish Consolidated Placer Oil Mining Co. v. Testerman, 53 I.D. 205 (1930)

an issued lease and, if in the Department's opinion it was found to be invalid, proceed to cancel it administratively.[137] Especially important in this connection is the following language:

> "The purported lease gave the appellant no rights whatever in the land or anything therein. There is no reason why the Department should not have authority to cancel such a lease just the same as if it had been a prospecting permit."[138]

This change in position, unsupported by any authority except the negative reasoning quoted above, points to nothing else but a usurpation by the Secretary of a power which Congress refused to grant, and which the Department earlier conceded it did not have. Moreover, it was an assumption of a judicial function, for the premise to the Secretary's reasoning is that the lease being dealt with was determined by him to be invalid--not that he would merely treat it as invalid and defend his position before the courts, if necessary. The Congress plainly drew a distinction between a lease and a permit.[139] The opinion recognizes the distinction, but then in effect tells the Congress there are no grounds for the distinction.

The Act was amended in 1935[140] to allow the Secretary to cancel any lease issued after August 21, 1935 for failure of the lessee to comply with the terms of the lease, provided the lands covered under the lease were not known to contain

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137. Fenelon Boesche, A21230 (Feb. 21, 1938) (Unpublished)
138. Ibid
139. See note 138 supra
140. 49 Stat. 676, 30 U.S.C. §§ 223, 226 (1958)

valuable deposits of oil and gas. If they did contain such deposits, court proceedings were required to accomplish cancellation. This is the only power to administratively cancel an outstanding oil and gas lease that has ever been granted the Secretary. In the Boesche case, supra, there was no allegation that he had in any way failed to comply with the terms of the lease, rather the case was prosecuted on the grounds the government didn't have title to the land at the time the lease was executed. The net result was a quiet title action by administrative fiat.

Since the Boesche case this concept of power has been broadened considerably. In the latest available edition of the Secretary's regulations it is provided that any lease issued after July 21, 1954 may be cancelled administratively for failure of the lessee to "comply with any of the provisions of the Act, of the regulations issued thereunder, or of the lease. . . ."[141] The purported power here described is obviously much broader than that claimed in Boesche, and the source of the power to issue such a regulation is a mystery. The statute plainly prohibits such action. The pertinent provision of the Leasing Act concerning cancellation of outstanding leases provides:

> "Except as otherwise herein provided, any lease issued under the provisions of . . . (this Act) may be forfeited and canceled by an appropriate proceeding in the United States District Court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of

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141. 43 CFR 192.161 (Supp 1960)

> "said . . . (Act), of the lease, or of the general regulations promulgated under said. . .(Act) and in force at the date of the lease. . ..
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> "Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. . .."[142]

There is certainly nothing in the section quoted which could serve as a basis for such a regulation. A fair reading of the language would seem to require that if the lessee fails to comply with any provision of the law, the lease, or the administrative regulations in force at the date of issuance of the lease, a proceeding in an appropriate United States District Court would be required unless the lease was issued subsequent to August 21, 1935, in which case it could be cancelled by the Secretary administratively only for failure to comply with the stated lease provisions. And the latter action could be taken only in case the lands did not contain valuable deposits of oil and gas. If they did, he would be required to go into court to cancel the lease for any reason.

Whatever the basis for the argument that such power resides in the Secretary, it obviously enjoys considerable vitality in the Department of Interior. In a letter to the Chairman of the Committee on Interior and Insular Affairs,

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142. 30 U.S.C. § 188 (1958)

dated February 24, 1960, setting forth the Department's views on pending legislation which would have specifically prohibited administrative cancellation of any interest in lands known to contain valuable deposits of oil and gas, or where fraud is alleged in the acquisition or holding of any interest therein, the Under Secretary of Interior stated:

> "This is an important material change from the present law since the Secretary now has full authority to cancel leases, whether on producing or nonproducing acreage, where fraud is proved in their acquisition. The present prohibition on the administrative cancellation of leases where producing acreage is involved (30 U.S.C. 188) is limited to leases which have been lawfully issued." [143]

Inherent in this view is the premise that the Secretary would make his own determination as to whether or not the lease had been lawfully issued or whether fraud was involved, and then proceed to sit as prosecutor, judge and jury in the cases. But the statute makes no distinction between leases the Secretary believes to have been unlawfully issued and those he believes to have been lawfully issued. Such a view casts a continuing cloud, at least potential even when not actually implemented, over the leases on untold thousands of acres of public lands.

Moreover, the statute requires that the conditions giving rise to the cancellation must occur subsequent to issuance of the lease. Yet a review of the Interior Department decisions

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143. Brief for Appellee, p. 13, Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir 1960). The letter is printed with minor deletions at page 33 of the brief.

reveals that at least the majority of the leases cancelled were cancelled administratively for reasons existing prior to issuance. In its petition to the Supreme Court in the Pan American[144] case, the government stated that in the three year period ending June 30, 1960, 1,129 oil and gas leases on the public lands were cancelled administratively. In its brief to the Court of Appeals for the District of Columbia in the Boesche case, the government further states that "all of these 1,129 cancellations were for reasons existing prior to the issuance of the lease."[145] In the Pan American petition it was further stated that "because of the size of this (leasing) program, mistakes in its administration unavoidably occur which require that leases valid on their face be cancelled administratively for reasons existing prior to the issuance of the leases."[146]

From this statement we must assume the Secretary considers he has full authority to cancel any lease which he considers to have been issued by mistake or inadvertance, and, coupled with the prior statement of the Under Secretary, shows he is of the opinion his power is unlimited. Practically any case arising which might be considered for cancellation would fall in one or the other of those categories for administrative purposes. It also seems fair to say that not one of the cancellations

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144. Petition for certiorari, p. 10, Pan American Petroleum Corp. v. Pierson, 366 U.S. 936(1961)
145. Op. cit. supra note 132 at 16
146. Op. cit. supra note 144.

made in the three year period ending June 30, 1960 was made in accordance with the statutory requirements.

VII

THE TITLE PROBLEM

Perhaps the greatest evil flowing from this practice is the effect on the title status of the lands affected. In most instances the title goes out of the government, and although in some cases it may be voidable it isn't void. In other cases the act of issuance is void ab initio and no title passes. The same type of circumstances which prevent title passage under a land patent will also prevent passage under a lease. Thus a lease of land issued in violation of a statute which prohibited its leasing would not take title out of the government, nor would title pass where the lands have been validly withdrawn from leasing and reserved for other government uses, or where it was already under a valid lease to another.[147] But in cases in which the government had jurisdiction over lands which were available for leasing for oil and gas development, and through error or mistake they were leased, so much of the interest as is covered by the lease goes out of the government into the hands of the lessee according to the terms of the lease instrument.

A review of some of the decisions emanating from the Department of Interior will illustrate the title problems created by these cancellations. In the case of Bettie H.

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147. See page 29, supra

Reid,[148] applicant Reid filed for a noncompetitive oil and gas lease on certain lands in New Mexico on August 19, 1947, which included the NE¼ sec. 18, T.24S.,R.29E., NM PM. On January 26, 1951, the manager of the cognizant land office rejected her application as to this land on the grounds the land had been withdrawn for reclamation purposes. The information was erroneous, as only the W½NE¼ had been withdrawn. The E½NE¼ was available for leasing. On April 5, 1951, one Pipkin filed for a noncompetitive lease which included the land aforementioned, and action was taken prospectively to issue her a lease effective June 1, 1951. In the interim Reid learned of the error of the land officer and filed a subsequent application which was formally denied on June 19, 1951, and she appealed. The lease to Pipkin had become effective on June 1. The Solicitor reversed the decision of the Director of the Bureau of Land Management, ordered Pipkin's lease to the land cancelled, the land offered to Reid, and a lease was issued to her.

Charles D. Edmonson[149] involved three cases which were consolidated into a single opinion by the Solicitor of the Department of Interior. In the Edmonson case, one Elmgren's application for a noncompetitive lease to a certain 40-acre tract was rejected on the grounds the land had either been patented without reservation of the oil and gas to the United States or had been leased to another. Elmgren did not appeal.

148. 61 I.D. 1 (1952)
149. 61. I.D. 355(1954)

Edmonson then filed for the same 40-acre tract but before action was taken on his application Elmgren was allowed to amend his application, on the grounds the prior rejection was in error, and obtain a lease on the land. Edmonson appealed.

In the second case, one Graham filed for a noncompetitive lease on 2,560 acres of land. His application was rejected on the grounds the lands were included in an Indian Reservation. He did not appeal from the rejection and the land was subsequently leased to two other individuals. Graham then requested reinstatement of his application and cancellation of the issued leases. These requests were denied and he appealed.

In the third case, J. R. Gillbergh filed an application for a noncompetitive lease on land in the Ashley National Forest. This application was rejected on the grounds the land had been patented without reservation of the oil and gas to the United States. He then filed another application for a lease on other land in the Forest which was also rejected, partially on the grounds that part of the land was State owned and partially because a portion of the land was erroneously believed to have been patented without reservation of the oil and gas. The land was subsequently leased to four other individuals. Gillbergh then appealed from the rejections and the Associate Director of the Bureau of Land Management held the four leases for cancellation and reinstated Gillbergh's applications. One of the lessees appealed.

The Solicitor, in the course of his opinion, reviewed the Reid case and stated:

> ". . . the lease (between the United States and Pipkin) was a binding instrument with respect to both parties and could not be vitiated by unilateral action . . .. Accordingly, it seems clear that a binding contract existed between the (parties). . . at the time Mrs. Reid filed her application for reinstatement."[150] (Emphasis supplied)

It is impossible to reconcile the Solicitor's language with the action in the Reid case. Moreover, after this solemn pronouncement as to the binding nature of the federal oil and gas leases, it took approximately three pages of the opinion for him to reach the conclusion to cancel the leases of three lessees in these cases.

In another case[151] a prior lessee relinquished a lease on certain acquired lands on July 7, 1949. On August 8, 1950, the Assistant Director of the Bureau of Land Management canceled the lease effective July 7, 1949. The cancellation was not noted on the acquired lands plat records in the Washington office until September 15, 1954. In the meantime, one Van Arsdale filed an application to lease the same lands on a noncompetitive basis on October 22, 1951, and was issued a lease September 1, 1954. On September 23, 1954, the Minerals Officer of the Bureau of Land Management canceled the lease on the grounds the regulations[152] then in effect provided

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150. Id at 363
151. B. E. Van Arsdale, 62 I.D. 475 (1955)
152. 43 CFR 192.43 (Supp 1953)

that the lands were not available for leasing, following relinquishment or cancellation of a lease, until such fact had been noted on the appropriate tract book.

In none of the cases discussed above had the lessee in any way violated the terms of the lease. The decisions of the Department of Interior in connection therewith are devoid of any suggestion that the lessee had not respected the terms of his agreement. It can be seen from the facts involved that the grounds advanced in support of cancellation were in existence at the time of issuance of the lease and were known, or could have been known, to the officers of the cognizant land offices.

These Secretarial decisions cannot be squared with the land patent cases, nor does there seem to be any reasonable basis on which oil and gas leasehold-property interests can be distinguished from the land patent as to avoid the analogy with those cases. We turn now to the court decisions specifically concerned with cancellation of issued federal oil and gas leases as our ultimate test of the validity of this conclusion.

VIII

JUDICIAL TREATMENT OF ADMINISTRATIVE CANCELLATIONS

Few cases involving the legality of administrative cancellation of oil and gas leases have been before the courts. While this may seem strange in view of the large number of cancellations which the Department of Interior admits have been made,[153] the great majority of these cases involve rather minor acreage in purely wildcat territory. The investment involved was relatively small and in the majority of cases it would have been more costly to litigate the matter than accept the decision and lose the investment. Few lessees would take the time and expense to fight the cancellation of a leasehold interest having no special value--the usual status of most undeveloped oil and gas leases, federal and private. The Pan American[154] case would probably have gone the way of the cases just discussed had it not been a minority situation involving acreage of proven value. It requires no particular argument, however, to demonstrate that security of title throughout these leaseholds is essential if the risks are to be taken which will lead to discovery of the small but valuable part of the whole which does contain oil and gas in commercial quantities.

The instances in which the alleged power has been challenged present some rather interesting decisions. The Court of Appeals

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153. See note 144 supra
154. 284 F.2d 649 (1960)

for the District of Columbia expressed its view on the limitation of administrative action in connection with the threatened cancellation of an oil and gas lease some thirty years ago in Bell Oil & Gas Company v. Wilbur.[155] There the Secretary of Interior threatened to cancel some leases on government land for failure of the lessee to pay 15 cents per barrel above posted field price for royalty oil, and the lessee sued to enjoin him from instituting cancellation proceedings or interfering with the operation of the leases. The decree of the lower court dismissing the complaint was affirmed on the ground the lessee had an adequate remedy at law, but in the course of the opinion the court said:

> "The Secretary, under the terms of the Act, has no power by his own fiat to cancel these leases. He is required to go into a District Court of the United States to accomplish that result by a proceeding in equity."[156]

It will be observed here that this case arose prior to the 1935 amendment[157] which gave the Secretary his limited authority to cancel leases for failure to comply with the lease provisions. Hence, considered alongside the statute as it was then worded, it was the view of the court that the Secretary was totally without power to cancel a lease for any reason. Proper statutory construction would indicate that this continues to be the situation except for the one statutory exception created since this decision.[158]

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155. 50 F.2d 1070 (1931)
156. Id at 1071
157. See note 139 supra
158. Crawford, Statutory Construction 483 (1940)

McKay v. Wahlenmaier[159] was decided twenty-six years later by the same court. Some of the language in that opinion has done more to bolster the Secretary's view that he not only has the power but the duty to administratively cancel oil and gas leases he considers to have been improperly issued than any case that has been decided in connection with the public lands.

In that case one Culbertson was president and owner of 23.7 per cent of the capital stock of Culbertson & Irwin, Inc., a corporation engaged in the oil and gas business. The corporation filed an application for certain lands in New Mexico on which a prior lease had been canceled. The Secretary had determined that all applications filed before a certain date would be considered simultaneous filings and a drawing would be held to determine the priority of applicants.[160]

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159. 226 F.2d 35 (1935)

160. 43 CFR 192.43(1954) provided: "Where a noncompetitive lease is canceled or relinquished. . . the lands(are not available until) the notation of the cancellation or relinquishment is made on the tract book. . .." It is further provided that priority of applicants shall be determined by drawing (43 CFR 192.43(d), 295.8 (Supp. 1961)) The specific regulation (43 CFR 192.42 (c) (Supp 1946) Culbertson allegedly violated provided: "A statement of the interests, direct and indirect, held by the applicant in oil and gas leases, and applications therefor on public lands in the same State, identifying by serial number the records wherein such interests may be found" was required to be filed with the application. 43 CFR 192.42(e)3(1954) requires disclosure of whether or not these holdings will exceed the allowable acreage under the statute. Part (f) of subparagraph 6 thereof requires a corporation to disclose "the names and addresses of the stockholders holding 20% or more of the stock in the corporation." It does not appear the corporation made such a disclosure in this case.

Two days later Culbertson filed an application for the same land. Irwin, a vice-president of the corporation and owner of 19.3 per cent of the capital stock, then filed a like application the day after Culbertson filed. No application made reference to the other two. The applications were identical in form, prepared in the same office of the corporation, were dated, signed, and acknowledged before the same notary, though filed on separate days. The drawing was held and Culbertson's name was drawn first. Wahlenamier's name was drawn second.

After a lease was issued to Culbertson, Wahlenmaier was notified his offer was rejected for the reason that a lease had been issued to Culbertson. Wahlenmaier protested, calling the Secretary's attention to the facts set forth above. The Secretary found Culbertson had violated the regulations requiring disclosure of his interests as a shareholder in his corporation's federal oil and gas leases but refused to cancel Culbertson's lease. Wahlenmaier filed suit in which he asked the court to adjudge Culbertson not a qualified applicant. He also asked that the Secretary be directed to cancel the lease to Culbertson and issue one to him. The relief was granted and the Secretary appealed. The Court of Appeals for the District of Columbia affirmed the judgment, holding that the Secretary was bound by his own regulations and that he was "plainly wrong in refusing to cancel the lease. . . ."[161]

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161. 226 F.2d at 47

It further observed that:

> "The Secretary's decision was probably based on confusion as to the nature of the question before him, and misapprehension of his own power and duty to cancel. . . (the) lease. . . ."[162] (Emphasis supplied)

Apparently the reasoning behind the Secretary's refusal to act was that the regulation was designed to point up situations in which the lessee, if the requested lease was issued, would receive more than the maximum allowable acreage. When he determined the issuance of the lease would not give Culbertson more than the allowable acreage, he concluded the violation was of no consequence. Also, the contest was primarily between Culbertson and Wahlenmaier and it is sometimes the practice of the Department to refrain from entering into disputes between contesting claimants when Departmental action would not restore the lands to the public domain.[163]

Significantly, neither Wahlenmaier nor the Secretary urged the prior precedent of the Bell Oil & Gas Company[164] case, and for a very good reason. Neither party was interested in attacking the Secretary's power to cancel the lease. Wahlenmaier wanted Secretarial cancellation and the Secretary had no interest in attacking his frequently asserted power which he had simply chosen not to exercise in this case. Thus no party was before the court that was interested in raising the fundamental question and there is no indication in the

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162. Ibid
163. See Copper Belt Silver & Mining Co., 54 I.D. 475 (1934)
164. See note 155 supra

opinion that the court dealt with the problem on any deeper basis than the issue posed to it by the parties. So analyzed, the Wahlenmaier decision becomes a weak precedent indeed, for only in cases in which issues are squarely litigated are strong precedents found.

The language quoted from Wahlenmaier, supra, would seem to indicate the Secretary has the duty to cancel any lease he determines to have been improperly issued, regardless of reason. In view of the court's position, it could also be argued that the statute[165] is not a limitation on the exercise of his power in this respect, despite its express language and history. This is the exact position now taken by the Department of Interior, and we find Wahlenmaier being cited in support of cancellation after cancellation since the case was decided.[166]

In 1958 the same court decided Seaton v. The Texas Company[167] in which the Secretary relied upon Wahlenmaier to support his departmental action. There, one Dorough had applied for a non-competitive lease on certain lands in North Dakota in 1948. Having received no word after a period of time, he wrote the regional land office at Billings, Montana that if any part of the land included in his application was acquired land, he desired "this letter (be considered as) formal notice that it

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165. 30 U.S.C. § 226 (1958)
166. For example, see L. E. Grammer, 66 I.D. 201 (1959); Malcolm C. Petrie, 66 I.D. 288 (1959); Duncan Miller, 66 I.D. 388 (1959).
167. 256 F.2d 718 (D.C. Cir. 1958)

is my desire that the matter be forwarded to your proper land office in order that an oil and gas lease can be issued."[168] He was advised that a certain 40-acre tract was acquired land and to file a new application for that land. Instead, he wrote the regional office and requested his application be forwarded to Washington and treated as an application for lease of acquired lands to preserve its filing date and priority. He re-filed an application for the lands stated by the land office to be public domain land. He was issued an acquired land lease on the 40 acres on December 1, 1951. After Dorough filed but before his lease issued, one Snyder filed for a noncompetitive public domain lease upon the same lands. His application was rejected, but the rejection revoked upon discovery that, while the surface was acquired land, the title to the oil and gas therein had at all times remained in the United States and was still a part of the public domain. The lease therefore issued to Snyder excluding the 40 acres was then amended to include this tract, which was also covered by Dorough's prior lease. Dorough, meanwhile, had assigned his lease to The Texas Company. Though not producing acreage itself, oil and gas development in the area brought this 40 acres in issue into close proximity with producing acreage. Accordingly, it had real value and formed the basis for a real contest.

Snyder requested that Dorough's lease be cancelled as to

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168. The Texas Company, 61 I.D. 367, 368 (1954)

the 40 acres in question. The Chief of the Division of Minerals of the Bureau of Land Management canceled Dorough's lease, without notice, as to the 40 acres. An appeal to the Secretary of the Interior resulted in affirmance of the cancellation. The Texas Company then filed suit in district court. That court ordered the Secretary to restore the lease to The Texas Company and directed Snyder to surrender his lease to the Secretary for cancellation. The Secretary and Snyder appealed.

The Circuit Court of Appeals for the District of Columbia rendered two decisions in the case. If the first opinion had been allowed to stand it would have been a considerable contribution to an overall solution to the problem. The first opinion was rendered on October 3, 1957,[169] but before it was printed a rehearing was granted and that opinion was withdrawn and a second opinion substituted for it. The first opinion stated:

> "But we think that Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed. And the relevant considerations weigh against implying the power. . .. It has long been held that once a patent to public land is granted by the United States it may be canceled only by a court in judicial proceedings, and not merely on a limited judicial review of previous administrative cancellation. . ..
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169. See Appendix I

> "We think McKay v. Wahlenmaier . . . does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as a result of a judicial proceeding . . .." [170] (Emphasis supplied)

The disapproval above set forth is sufficiently broad to cover any cancellation except those specifically provided for in the statute.[171] Obviously it would prohibit any of the administrative cancellations hereinbefore discussed. If the court meant what it said, then it is difficult to reconcile the strong disapproval of the Secretary's action and the later intimation (if indeed such was intended) that he might have cancelled the lease in the Wahlenmaier case. It seems clear the court did not mean to imply the Secretary could himself make a determination as to the validity of title, for certainly Congress has not bestowed that power upon him. And it is apparent that the court, having unduly extended itself in the Wahlemaier case, was here trying to loose itself from the bonds of some rather unfortunate language.

Another portion of the quoted language which is especially significant is that in which the lease is considered analogous to a land patent. This appears to be the first time such an analogy was drawn by a court. This concept was carried over into the published second opinion in the case, though as dictum,

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170. Ibid
171. 30 U.S.C. § 188 (1958)

and was also stated and approved by Judge Breitenstein in the Pan American[172] case.

The second opinion[173] in the case actually turned on the more limited ground that the cancellation was not "valid administrative action." There is not much comfort for the Secretary in the modified ground adopted in the opinion, however, for the court reasserted the essential validity of its first opinion when it said:

> "If the cancellation of the Dorough lease was not permissible under the principles of the land patent cases it should be set aside. If cancellation was not permissible as valid administrative action of the Secretary it should be set aside for that reason. We think it was not valid administrative action. This makes it unnecessary to cope with the applicability of the land patent cases, and we accordingly withdraw our opinion of October 3, 1957" [174]

Perhaps the court here was choosing a ground for decision which sounded less opprobrious to the Secretary, but the fact remains that if the lease is analogous to the land patent it could hardly be within his power to cancel it without authority of statute or the courts. Such action would clearly not be valid administrative action.

It has been suggested[175] that the cases just discussed may have prompted the Secretary to initiate the administrative proceedings which gave rise to Pan American Petroleum Corp.

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172. 284 F.2d at 655
173. 256 F.2d 718 (1958)
174. Id at 721
175. Stull, Authority of the Secretary of the Interior to Cancel Noncompetitive Oil and Gas Leases by Administrative Action, 5 Rocky Mt. Min. Inst. 1 (1960)

v. Pierson.[176] Considering the language of the opinions, this is perhaps a reasonable answer as to why such action was taken, although none of those cases represent such an extraordinary claim of power as does Pan American. There it was alleged that one Davis, the original lessee, with others, conspired to obtain leases by fraud for the purpose of enabling Davis to obtain acreage exceeding allowable limits under the Leasing Act.[177] Some of these leases had found their way into the hands of bona fide purchasers for value, including Pan American. Some of the leases were producing, others were not producing but were known to contain oil and gas, while others were neither producing nor known to contain oil and gas. It can readily be seen that at least some of the leases fell squarely within the statutory prohibition against cancellation by administrative proceedings even for violation of the lease provisions.[178]

Upon initiation of the proceedings, Pan American filed a petition for injunctive relief in the Wyoming District Court on the grounds that the only remedy available to the Secretary was a proceeding instituted by the Attorney General of the United States in the United States District Court for the district in which the leased property was located or in which the lease owner might be found; that no power existed in the Secretary or his subordinates to cancel such leases

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176. See note 154 supra
177. 30 U.S.C. § 184 (1958)
178. 30 U.S.C. § 188 (1958)

administratively; and that the proceedings were unauthorized and a direct violation of the statute. The District Judge dismissed the complaint on the grounds the Secretary of Interior was an indispensable party,[179] but in doing so he observed that:

> "From what I have said I hold the Supervisor is proceeding in contravention of the clear mandate of the statute, his own regulations, and in violation of the terms of the lease when he proceeds administratively to cancel leases on lands known to contain valuable oil and gas deposits. This prerogative Congress has reserved to the courts." [180]

The Court of Appeals for the Tenth Circuit rejected the contention the Secretary was an indispensable party on the grounds that the relief sought required no action by either the Secretary or any subordinate; that there was no effort to compel the exercise of power or authority, but an effort to prevent the alleged wrongful exercise of claimed power and authority by a local land official; and that since the relief sought would operate only upon the local land officers, it would suffice to restrain them from proceeding administratively. The court went on to consider the applicable provisions of the Leasing Act[181] and the government's contention that retention of the fee title in the case of an oil and gas lease rendered the land patent cases inapplicable. It brushed aside the claim that the prohibitions against administrative cancellation was

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179. The court relied upon Richman v. Beck, 257 F.2d 575 (10th Cir 1958); cf Williams v. Fanning, 332 U.S. 490 (1947)
180. Pan American petroleum Corp. v. Pierson, 181 F. Supp. 557, 563 (D. Wyo. 1960)
181. 30 U.S.C. §§ 184, 188 (1958)

not applicable to cases in which the lease had been procured by fraud, saying that it made no difference whether the lessee be deemed to acquire title to the oil and gas in place or upon severance from the reservoir because the leasehold was in the nature of a profit a prendre. In each case, said the court, the issuance of the lease was the last act required of the government to vest in the lessee the right to conduct explorations upon the land, produce, market and sell the oil and gas found underlying the premises; and that this act carried the same character of finality as did the issuance of a patent to the non-mineral lands of the public domain. It went on to say that the difference between the patent and lease was no reason for a denial of the power to administratively cancel the patent but recognize it in the case of an oil and gas lease, unless Congress had authorized exercise of the power. In this connection the court further stated:

> "The courts have repeatedly held that he (the Secretary) is without power to annul a patent once it has issued. That power is reserved to the courts. In the absence of some statutory provisions giving him power to annul leases under the Mineral Leasing Act, that power is also reserved to the courts. . . . Otherwise, the new system created by the Mineral Leasing Act for the disposition of the Mineral reserves found on the public lands fails of its purpose. Certainty of title is an elementary prerequisite for the sound development of any mineral resource."[182]

In concluding the opinion the court opined that the Secretary has a right to investigate matters in connection with his administration of the Leasing Program under the Leasing Act, and

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182. 284 F.2d at 655

if in such investigations he finds circumstances indicating wrongful conduct which appear to justify cancellation of the lease, the action must be brought in the courts and not before the agency which made the investigation.

The Secretary thereupon filed a request for a hearing en banc and a petition for rehearing. Both were denied on the grounds that "the defendant officials are without authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance."[183]

Judge Breitenstein's opinion is an excellent treatment of the limitations upon Secretarial powers under the Leasing Act, and, it is submitted, properly equates the finality in lease issuance to that of the patent. The supplemental statements in the denial of rehearing, however, raise the question as to whether or not the court was attempting to limit the scope of its previous opinion to cases in which fraud was alleged in procurement of leases. It doesn't seem logical to entertain the presumption that any such result was intended. The heart of the decision rests upon the premise that once the title to any interest, either leasehold or fee, leaves the government it is then beyond the reach of administrative action. Whether the cause of its passage was fraud, mistake or error, makes no difference. The point of the matter is that it has gone. Underlying this view is the court's recognition

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183. Id at 657

of the problems flowing from uncertainty of title created by "administrative cancellations" which, as a practical matter, put the lessee in an impossible position.[184]

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184. Under the regulations (43 CFR 221.2(b) (Supp 1960)) the Director of Geological Survey has control over enforcement of the provisions of the regulations pertaining to operations. Under his administrative direction is a Supervisor over the district wherein the lands are located who has the responsibility of enforcement of the law and regulations in that district. The Supervisor has the authority to require a lessee to produce evidence that the lease is in "good standing" before permitting operations on the land (43 CFR 221.5 (Supp 1960)). If the Secretary is contesting the validity of a lease it is highly unlikely that the lessee will be able to get permission from the Supervisor--even if he were foolhardy enough to attempt it--to conduct drilling operations on the land. The expense and risk involved is notorious, and might well mean economic ruin for the lessee if the should be forced to forego development of a property for a prolonged period of time. The cloud on the title may jeopardize the sale of production from the lands as well. Inherent in this situation is also the potential threat, even though a lease title is not yet challenged, which compels the lessee always to act at this peril if the Secretary's position is correct.

The problem is not confined to isolated instances. The Pan American case involved a total of 87 defendants and 86 leases. In a subsequent action within approximately six months of that case, the Department initiated proceedings against 147 defendants in an attack on the validity of 374 leases. See Hearings on S. 2181, S. 1496, S.1497, S.1272, S.2308, S.852, S.853, and S.2389 Before a Subcommittee of the Senate Committee on Interior and Insular Affairs, 86th Cong. 1st. Sess. 112 (1959) for a discussion of these cases and the problems involved.

Neither the near-miss in Seaton v. The Texas Company[185] nor the defeat in Pan American Petroleum Corp. v. Pierson[186] seems to have blunted the Department's desire for further litigation of the issue. There is now pending on appeal another suit[187] which was occasioned by an attempt by the Secretary to cancel an outstanding lease on the grounds that issuance of the lease violated one of his own regulations, requiring that no offer to lease

> ". . . may be made for less than 640 acres except where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey, or where the land is surrounded by lands not available for leasing under the act." [188]

In that case one Boesche filed an application to lease the W½ NW¼ of Sec. 21, T.22N., R.16W., Indian Meridian, Oklahoma, on September 11, 1956. Also available for leasing at the time was the NW¼ SW¼ which, according to the above regulation, should have been included therein. Subsequently, on the same day, two other persons filed an offer to lease the entire acreage. On November 15, 1957 a lease was issued to Boesche covering the W½ NW¼. The other applications were accordingly denied and the applicants appealed. The Director of the Bureau of Land Management reversed the denial and held Boesche's lease for cancellation. This action was affirmed

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185. 256 F.2d 718 (1958)
186. 284 F.2d 649 (1960)
187. Boesche's Administrator v. Udall, Civ. No. 16,238 (D.C. Cir, April 16, 1961)
188. 43 CFR 192.42(d)(Supp 1960)

by the Secretary of the Interior. Boesche died and his administrator filed suit on September 4, 1959 in the District Court for the District of Columbia seeking to enjoin, pendente lite, the Secretary from cancelling the lease, to review his actions, and to declare that no authority existed for cancellation of the lease. The District Court in a memorandum opinion concluded that ". . . the Secretary of the Interior may cancel or direct the cancellation of a lease covering the same lands erroneously issued by a subordinate to another applicant."[189] The court thereupon dismissed the complaint and the plaintiff appealed. The Court of Appeals has not rendered a decision in the case.

It is quite obvious the trial judge considered this to be "valid administrative action" and that the principles of the land patent cases did not apply. There appears to be no difference in the government's position in relation to the title in this case than the cases previously discussed. Whatever title it had to the leasehold passed to Boesche upon execution of the instrument, since the breach of the regulation did not destroy the jurisdiction of the Department to issue the lease. If this be so, it is difficult to imagine how the court could reach such a conclusion in the face of the plain language of the statute and the holding of the Court of Appeals for the District of Columbia in The Texas Company[190] case.

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189. Op. cit. supra note 131 at 5
190. 256 F.2d 718(1958)

This decision is also squarely in opposition to the Tenth Circuit's holding in the Pan American[191] case. It appears the trial judge assumed a power in the Secretary which two circuit courts, one his own, have indicated does not exist.

IX

THE ADMINISTRATIVE LAW PROBLEM

The Leasing Act[192] does nothing more than provide the basic framework for disposal of the mineral resources on the public lands. It left to the Secretary[193] the responsibility of providing such regulations as might be required to carry into effect the legislative intent. In this connection he was given wide discretionary powers as to how or by what method he would secure compliance with the statutory scheme. If the purpose of the law is not to be frustrated, this discretionary power is necessary, else the flexibility of action necessary to meet varying situations arising in the administration of the Act is absent. These powers are no different here than he possessed under prior land laws.

The courts have respected the exercise of these discretionary powers in the administration of the laws relating to disposal of the public lands for over three quarters of a century. In Gaines v. Thompson,[194] one of the early land patent cases, the Supreme Court refused to enjoin the Commissioner of the Land Office and the Secretary of the Interior from taking action

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191. 284 F.2d 649 (1960)
192. 30 U.S.C. §§ 181-287 (1958)
193. 30 U.S.C. § 189 (1958)
194. 74 U.S. 347 (1868)

which required interpretation of a point of law prior to disposal of land on the grounds such action was within their administrative jurisdiction, involving an exercise of discretionary power, and to grant injunctive relief would be an improper intrusion into the Executive area. But the court has also recognized that, when the last act required under the legislative scheme has been performed, there is no room for further exercise of the discretionary power. Thus if all the requirements preceding the issuance of a patent have been met by the applicant, mandamus will lie to compel its execution and delivery.[195]

The purpose of the Leasing Act was to provide for orderly exploration, development and disposal of mineral resources on the public lands.[196] Under the terms of the Act it was provided that this should be accomplished under a leasing procedure, and that the Secretary should be delegated the responsibility of attending to the issuance of these leases so that the resources might be developed. From this it would appear that the purpose of the statute also defines the limitations of his administrative power, for necessarily included within the positive delegation of the power is the basic premise that its exercise will not be extended beyond the requirements of the legislative scheme. Once the purpose is accomplished, the agency power under the grant is ended.[197]

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195. Lane v. Hoglund, 244 U.S. 174(1917)
196. West v. Work, 11 F.2d 828 (1926), Cert. denied 271 U.S. 689 (1926)
197. See Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401 (1958)

As the agency moves beyond that limit it loses administrative jurisdiction over the subject matter; if it then proceeds to take away a vested property interest, it violates the Constitutional requirement of due process.

In this country, the citizenry have always looked to the courts for a fair and impartial determination of their vested rights concerning property. Whether the right arises from government action or in the conduct of purely private relations with other citizens is immaterial. Underlying this view is the cherished notion that determination of such rights is, in the final analysis, properly a judicial function, in the exercise of which the Executive Department of the government has no right to intrude. If this is not so, our faith in the solemn pronouncement contained in the Fifth Amendment is misplaced.

The difficulty here is that the Secretary does not consider himself limited to the purposes of the statute and has taken it upon himself to exercise administrative power over an issued lease which Congress has refused to give and the courts have refused to recognize. He steadfastly refuses to accept the proposition that the lease passes the leasehold title out of the United States in accordance with, and to the extent of, the terms of the leasing instrument. He considers the lease not a final disposal at all, but rather the grant of a privilege which remains within his total administrative power at all times to either honor or destroy. Since the government retains legal title to the fee, it is contended

the umbilical cord of ownership is not severed to a sufficient degree to warrant a denial of the exercise of complete administrative control over the leasehold during its existence. This position is not only refuted by the terms of the statute and its legislative history,[198] but the decisions of the courts as well.[199]

As earlier mentioned, the majority of the cases in which the exercise of this alleged power has occurred have been those in which the lease has been allegedly issued in violation of Departmental Regulations. One writer has opined that:

> ". . . an unyielding rule, either that a lease is always subject to cancellation if the application disregards a regulation or that a lease is forever beyond recall as soon as it is approved by the manager and delivered, will not meet the needs of varying situations.
>
> It is submitted that the delivery of a lease to the lessee should be held not to constitute a final issuance of the lease, so long as there are pending any other applications, until all the pending applications have been adjudicated and the applicants have had an opportunity to appeal." [200]

No argument can be advanced against the view that the need for stability of title and finality of administrative action demands that the rules be uniformly applied, and that there be a point

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198. See page 46 supra
199. Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir 1960); Seaton v. The Texas Company, 256 F.2d 718 (D.C. Cir 1958); Bell Oil & Gas Company v. Wilbur, 50 F.2d 1070 (D.C. Cir 1931)
200. Haughey, Problems in Examination of Titles to United States Oil and Gas Leases, 1 Rocky Mt. Min. Inst. 41 (1955)

beyond which the lease is immune from attack by administrative action. Nor can it be denied that it should be subject to attack after issuance for such things as fraud in procurement. The only problem is how the result may be accomplished and at the same time protect the interests of the government, the lessee and parties aggrieved by failure to obtain a lease whose equities may be superior to those of the lessee.

It is submitted that the above suggestion will not provide the solution to the problem. The Bureau of Land Management now has the power to delay issuance of the lease as long as may be required to make its determinations as to satisfaction of statutory requirements, and the issuance of a provisional lease would not afford any improved device to accomplish that objective. Presumably, the validity of the lease would depend upon proceedings had after its issuance and, if adverse to the provisional lessee, it could be recalled and cancelled by the Secretary, all through his own administrative machinery. The only course open to the Secretary as the law is now written is to leave matters concerning cancellation, except in cases involving a breach of the lease provisions by the lessee, to the judiciary. To allow further administrative proceedings affecting title after issuance of the lease, even with Congressional sanction, is to invite usurpation of judicial functions by administrative fiat. Moreover, it does not appear such provisional issuance of a lease would in any way benefit the lessee. It would be foolhardy for him to make any preparation to work the lease until the administrative machinery ground its way

through all the applications and delivered him a firm lease.

It is further submitted that the proper way to view the matter is that once the Secretary or his delegatee has determined an applicant is qualified under the statute, meets its requirements as to his right to receive a lease, and thereafter issues the lease, the subject matter has then passed beyond his control and is within the exclusive jurisdiction of the judiciary except in those instances in which Congress has expressly allowed administrative cancellation. At this point "administrative power to annul or cancel ends and judicial power begins."[201]

X

CONCLUSIONS AND RECOMMENDATIONS

The Secretary urges that he must have the administrative power over federal leases for which he contends because the volume of erroneously issued leases is so great, and court proceedings so tedious, so as to make any but his own administrative processes too burdensome upon the government.[202] The short answer to this contention is that administrative convenience cannot form a valid basis for the divestiture of vested property rights, and the answer is certainly implicit in the court decisions just considered.

Beyond this, however, the Secretary's position will not bear practical analysis.

In the first place, the problem is no greater than in the

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201. 284 F.2d at 654
202. Op. cit. supra note 132 at 22

land patent cases--probably not nearly so great--and denial of such a power in those cases seems not to have produced untoward consequences.

In the second place, it is well to recognize the limited interest of the United States in its leases. There is no selection of lessees in any sense of technical or financial qualifications. Any of millions of persons are acceptable, and the only concern of the United States is that the rentals and royalties called for by the lease are paid. Thus, in the usual situation it makes no difference who holds a lease and discharges the obligations under its terms.[203] This is not to suggest that the case will never arise in which the Secretary will wish to initiate action leading to a cancellation, but it is suggested that in the overwhelming majority of cases he can leave the contest to private litigation between the leaseholder and other aggrieved parties who believe

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203. 30 U.S.C.A. § 187a provides in part that: ". . . (A)ny oil or gas lease issued under the authority of . . . this title may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under. . .(this title). The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or for lack of sufficient bond." He also has authority to disapprove an assignment of a separate zone or deposit under any lease or of a part of a legal subdivision as a matter of discretion. (Emphasis supplied)

their rights to particular leasehold acreage superior to those of the lessee. The patent cases point the way.

Johnson v. Towsley[204] was a case between private persons contesting who should have the land, the patent for which had been issued. After trial on the merits it was decreed that a trust should be impressed on the patent held by one of the parties, whose rights were determined to be inferior to those of the other party. This means that the act of the United States in passing title was undisturbed, the court undertaking only to lodge the title thereby granted in the person entitled to it.

A moment's reflection will show the desirability of this rule. Few matters lend themselves to a black or white analysis. Let us suppose that a patent or lease is erroneously issued, but has passed to a bona fide purchaser. The bona fide purchaser should prevail.[205]

Let us suppose that a patent or lease is erroneously issued in such fashion that, from the beginning, another party was better entitled, but since that time the original holder

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204. 80 U.S. 72 (1871)

205. The Act of September 21, 1959, 73 Stat. 571, 30 U.S.C.A. § 184, gave some relief to the bona fide purchaser. This law provides that any party to a proceeding shall be promptly dismissed upon a showing that he acquired the interest involving him in the matter as a bona fide purchaser. There is, however, one situation which deserves comment. If a company or individual engages the services of a broker to procure leases and the broker violates the law, The Secretary might take the position that an agency relationship existed, thus placing the leaseholder beyond the provisions of the amendment.

has expended many hundreds of thousands of dollars and by the risk of such expenditures has discovered an oil pool worth millions of dollars. Is the party originally having the right to the lease better entitled to take all on a mere showing of such superior right?

Let us suppose that there was no other applicant, so that the contest, if any, is between the United States and the leaseholder. Though the United States might initially have had cancellation, is it to have that right here when great expense has been incurred and the prize found?

Perhaps, but it should be obvious in all these situations that the proper forum is a court sitting in equity that is able to balance equities, not only as these existed at issuance but that since may have accrued, and that has power, through an appropriate conditional decree if necessary, to do substantial justice among the parties as it finds them. The Secretary cannot perform such a function. He is not a court sitting in equity, nor is there any way in which he can be raised to such status.

It is submitted that the problem breaks down into two categories:

(1) A minority of cases where, usually as a matter of principle, the Secretary may wish to proceed in accordance with his statutory authority to seek cancellation of an issued lease that he believes to be voidable. Sometimes, too, the Secretary may wish to effect cancellation of wholly

void instruments to remove title clouds from land which he is charged with leasing. Usually this will not be necessary as the Secretary's suggestion of voidness will result in the lessee allowing his challenged lease to lapse for non-payment of rentals or he will surrender it.

(2) A majority of cases involving issued leases which can be left to litigation between leaseholders and aggrieved parties, including unsuccessful applicants. In these cases the courts, through application of principles of equity, can do substantial justice among the parties. Included will be situations of conflicting issued leases, one of which is necessarily void, where a litigant desires to remove the cloud of the void instrument from the valid leasehold title.

Johnson v. Towsley[206] teaches that this latter category of cases can be brought in the courts of the jurisdiction in which the lands lie, including state courts. That case, involving the patent contest previously alluded to, was tried in the Nebrasks State courts prior to review by the United States Supreme Court. A contest over an issued federal oil and gas lease does not involve any property interest of the United States, for its underlying fee interest (or possibility of reverter in the minerals if the ownership in place theory is followed) is not challenged or in any way brought into issue. No one denies this interest of the United States; no one challenges it. That the state courts as well as the federal courts are available to bear the burden of most of these controversies should go a long way to dispel any reluctance, real or pretended, to leave such litigation in the courts where the time-tested precedent of the patent cases shows that it belongs.

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206. 80 U.S. 72 (1871)

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APPENDIX

I

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13636

Fred A. Seaton, individually and as Secretary of the Interior, Appellant

v.

THE TEXAS COMPANY, APPELLEE

No. 13637

JOHN SNYDER, APPELLANT

v.

THE TEXAS COMPANY, APPELLEE

Appeals from the United States District Court for the District of Columbia

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Decided October 3, 1957

Mr. Roger P. Marquis, Attorney, Department of Justice, with whom Mr. S. Billingsley Hill, Attorney, Department of Justice, was on the brief, for appellant in No. 13636

Mr. James R. Browning for appellant in No. 13637.

Mr. John J. Wilson, with whom Messrs. Roger J. Whiteford and Philip S. Peyser were on the brief, for appellee.

Before Bazelon, Fahy and Burger, Circuit Judges.

FAHY, CIRCUIT JUDGE: The Secretary of the Interior and John Snyder appeal from a judgment of the District Court that appellee The Texas Company, assignee of Thomas G. Dorough, is the holder of a valid oil and gas lease on forty acres of land in North Dakota and that Snyder should surrender for cancellation a lease to him on the same acreage.[1]

Dorough applied April 19, 1948, for a noncompetitive oil and gas lease on some 2000 acres, including the forty acres in question. His application was made pursuant to the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 (1952), and was filed with the Bismarck, North Dakota, district land office of the Bureau of Land Management, Department of the Interior. The Act of 1920 authorizes the leasing of "public domain lands," and for purposes of an oil and gas lease the forty acres were of that character. By letter of January 25, 1949, however, the regional office of the Bureau at Billings, Montana, informed Dorough that most of the land covered by his application, including the forty acres, was "acquired land" and not public domain land. "Acquired land" is not in terms authorized to the leased under the Act of 1920, and, furthermore, an application for a lease on land of that character should be made with the Washington office of the Bureau. Dorough, in reply to the letter of January 25, asked the regional office to forward his application to Washington, "with a request that it be treated as an application for an oil and gas lease on acquired lands, thus retaining its filing time and date priority." On December 1, 1951, the United States, through the Bureau, issued to Dorough an oil and gas lease on this land, denominated a "Lease of Oil and Gas Lands Under the Act of August 7, 1947." That Act, 61 Stat. 913, 30 U.S.C. § 351 (1952), in terms authorizes the leasing only of acquired land.

Previous to the lease to Dorough, but after his application, Snyder filed with the Bureau of Land Management in Washington an application for an oil and gas lease on the same forty acres as well as on other land, all as public domain land and "pursuant and subject to" the Act of 1920. His application was transmitted to the office at Billings, Montana. It was at first rejected as to the forty acres in question but this action was revoked upon a showing that those acres were in fact public domain land. On April 24, 1953, a lease that had been issued to

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1. The forty acres are described as follows:
NE¼ SW¼ of Section 7 in Township 153 N., Range 95W., 5th Principal Meridian, McKenzie County, North Dakota

Snyder under the 1920 Act, was amended to include the forty acres, thus giving Snyder a lease to the same land and under the same Act as Dorough had originally sought for himself. The Bureau found that when the United States had issued a land patent on these forty acres in 1940 it had reserved the oil and gas rights. The land had been reconveyed to the United States two years later, but the oil and gas had remained at all times part of the public domain and were not "acquired."

On February 16, 1954, the Chief, Division of Minerals of the Bureau, at the request of Snyder, and without notice to Dorough, cancelled the lease to Dorough of December 1, 1951, on the ground that it had been erroneously issued under the Act of 1947, which was not available for the leasing of public domain land. On appeal to the Secretary of the Interior, taken by The Texas Company and Dorough, the Bureau decision was affirmed on the grounds hereinafter stated.[2] The Texas Company thereupon filed its complaint in the District Court. The parties there stipulated that the court should determine whether the Texas Company or Snyder holds the valid lease on the forty acres, except that "the stipulation was not to apply in the event that the Court's decision was based upon a finding that the purported cancellation of plaintiff's lease was not effective because of the lack of a judicial proceeding." The District Court ordered the Secretary to restore the lease to The Texas Company and directed Snyder to surrender his lease for cancellation by the Secretary. We affirm as to the restoration of the lease to "The Texas Company on the ground that judicial proceedings were essential to cancellation of the lease to Dorough, The Texas Company's assignor.

Dorough's original application, as we have seen, was filed under the proper statute, the Act of 1920. But the Secretary ruled that when the regional office by its letter of January 25, 1949, mistakenly informed Dorough that the forty acres were not public domain land but acquired land which could not be leased on his application made pursuant to the 1920 Act, and Dorough then asked the regional office to forward his application to Washington to be treated as an application for a lease on acquired lands, which was done, thereafter "Dorough's only valid application for the disputed tract was . . . an acquired land application filed in accordance with the pertinent regulations . . . with the Bureau of Land Management in Washington," while Snyder's application, though filed after Dorough's, was in proper form for public domain land. In this situation the Secretary ruled that Dorough's application "was not a proper one and failed

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2. Dorough also petitioned for reinstatement of his lease, which was denied.

to earn him the preference right to a public land oil and gas lease," and Snyder became the first qualified applicant with a proper application. See 30 U.S.C. § 226 (1952).

In court the position of the Secretary and Snyder is that the cancellation of Dorough's lease by the Secretary was reasonable and not arbitrary, and, therefore, the District Court could not reach a different conclusion on the merits. A number of cases are cited, including Ickes v. Underwood, 78 U. S. App. D.C. 396, 141 F.2d 546. This position presupposes a cancellation within the administrative competence of the Secretary. But we think that Dorough's lease, even if in some manner irregular, had acquired a status which necessitated judicial proceedings for its outright cancellation. Among the powers conferred by Congress upon the Secretary we find none which authorized his action in this case. If it exists it must be implied, for it is nowhere expressed. And the relevant considerations weigh against implying the power. The Secretary leased the forty acres to Dorough under the 1947 Act after Dorough had been advised, though no doubt erroneously, that his application under the 1920 Act was under the wrong Act. No other application preceded his. Seventeen months after leasing to Dorough the Secretary leased exactly the same land to Snyder, but under the 1920 Act. Ten months passed and then at Snyder's request a division chief, without notice to Dorough, cancelled Dorough's lease, action which was affirmed administratively by the Secretary after appeal to him and a hearing. The courts are asked to hold that this action cannot be set aside except for arbitrariness, and that in determining the question of arbitrariness the factual findings of the Secretary cannot be disturbed at all. We are not justified in implying the existence of such a method for disposing of the matter. In the absence of other provision by Congress, and we find none, the controversy was in an area for judicial determination in litigation initiated either by the Secretary or by other parties. It has long been held that once a patent to public land is granted by the United States it may be cancelled only by a court in original proceedings, and not merely on limited judicial review of previous administrative cancellation. United States v. Stone, 69 U.S. (2 Wall.) 525;[3] Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 84-87; Noble v. Union River Logging R.R., 147 U.S. 165, 176; and cases

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3. In this case the Court said:
Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them or where another party has a higher equity and should have received the patent. In such cases courts of law will pronounce them void. The patent is but evidence

cited;[4] Chandler v. Calumnet and Heda Mining Co., 149 U.S. 79;[5] Burke v. Southern Pac. R.R., 234 U.S. 669, 692, 710; and see Witbeck v. Hardeman, 51 F.2d 450, 452 (5th Cir.); Lane v. Watts, 234 U.S. 525, 540, affirming Lane v. Watts, 41 App. D.C. 139; United States v. Bell Tel. Co., 128 U.S. 315, 365; Ickes v. Fox, 300 U.S. 82. We see no difference in principle here. We need not consider whether Congress could provide otherwise consistently with due process of law. See, however, Noble v. Union River Logging R.R., supra, at p. 176. Congress has not provided otherwise. Congress

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of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.

4. There was jurisdiction in the Secretary to have issued the lease originally to Dorough, notwithstanding he did so mistakenly under the 1947 Act rather than the 1920 Act. See Noble v. Union River Logging R.R., supra, at 176. In other words, the mistake was not a jurisdictional one.

5. This case is of special interest. Defendant claimed title through an 1855 patent issued under an 1852 Act of Congress providing for the grant of land to Michigan to finance a canal. Plaintiff claimed through an 1887 patent which he contended was issued under an 1850 Act of Congress providing for grant of land for swamp drainage. Plaintiff attempted to prove by oral testimony that the land in question was in fact swamp land. The Court excluded this evidence, but went on to say that assuming the evidence were competent, that the land were swamp, and that

> the State, in patenting the demanded premises to the canal company, acted under mistake or misapprehension as to the character of the land so conveyed, still so long as that patent remains uncancelled and unrevoked by the State, it must be held that its legal effect was and is to pass whatever title the State had to the tract in question, however that title may have been originally acquired by the State.
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> . . . .
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> It is well settled that the State could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and until so cancelled or annulled it could not issue to another party any valid patent for the same land.

has provided in 30 U.S.C. § 188, not here applicable, for a judicial and an administrative proceeding for cancellation of leases in the circumstances and in the manner there stated. This is persuasive that Congress intended cancellation in other circumstances to be accomplished in a manner usual to the disposition of conflicting claims to the same interests stemming from a common grantor.

We think McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 226 F.2d 35, does not decide that administrative cancellation was available to the Secretary in the present case. There we held that the Culbertson lease should be cancelled, and ordered the Secretary to cancel it. We did say also that the Secretary could have cancelled in the situation there presented, but the fact is the cancellation was ordered by the court as the result of a judicial proceeding, and not on review of administrative cancellation. In Call v. Richfield Oil Corp., 101 F. Supp. 972 (S.D. Cal.), also relied upon by the Secretary, it seems that the court thought that if a lease were not valid it could be cancelled by the Secretary administratively; but this leaves unanswered the question as to how the question of validity, or of appropriate relief in case of invalidity or irregularity, is first to be adjudicated. Even if we were to assume a measure of invalidity, it would not follow that all rights of the lessee were terminated. In other words, in the circumstances here presented--and we do not deal with all possible situations--the ultimate rights and duties of the parties, including the United States, cannot be so molded initially by administrative corrective action as to be subject only to the limited judicial scrutiny applicable where an administrator acts within his sphere of discretion, as in United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, and like cases.

It is our opinion that the lease to Dorough could be cancelled against his will, or that of his assignee, only by judicial proceedings. In view of this we affirm the judgment of the District Court insofar as it orders the Secretary to restore the lease to The Texas Company, Dorough's assignee, without prejudice, however, to further proceedings not inconsistent with this opinion, initiated either by the Secretary or by others. Since we do not prejudge the outcome of such proceedings it is necessary to vacate that part of the judgment of the District Court which orders Snyder's lease to be surrendered for cancellation.

It is so ordered.

APPENDIX

II

Ninth Edition
(August 1961)

DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Office .....

Serial No. .....

Fill in on typewriter or print plainly in ink and sign in ink.

OFFER TO LEASE AND LEASE FOR OIL AND GAS
(Sec. 17 Noncompetitive Public Domain Lease)

The undersigned hereby offers to lease all or any of the lands described in item 2 that are available for lease, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181), as amended, hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force, when not inconsistent with any express and specific provisions herein, which are made a part hereof.

1. Mr. / Mrs. / Miss .....
(First Name, Middle Initial, Last Name)

Please notify the signing officer of any change of address.

.....
(Number and Street)

.....
(City and State)

2. Land requested: State ..... County ..... T. ..... : R. ..... : Meridian

Total Area ..... Acres

3. Land included in lease: State ..... County ..... T. ..... : R. ..... : Meridian

(Offeror does not fill in this block) Total Area ..... Acres Rental retained $.....

4. Amount remitted: Filing fee $10, Rental $....., Total $.....

5. Undersigned certifies as follows:
(a) Offeror is a citizen of the United States. Native born ..... Naturalized ..... Corporation or other legal entity (specify what kind): .....

(b) Offeror's interests, direct and indirect, do not exceed 200,000 acres in oil and gas options or 246,080 chargeable acres in options, offers to lease and leases in the same State, or 300,000 chargeable acres in leases, offers to lease and options in each leasing district in Alaska. (c) Offeror accepts as a part of this lease, to the extent applicable, the stipulations provided for in 43 CFR 191.6. (d) Offeror is 21 years of age or over (or if a corporation or other legal entity, is duly qualified as shown by statements made or referred to herein). (e) Offeror has described all surveyed lands by legal subdivisions, all lands covered by protracted surveys by appropriate subdivisions thereof, or all unsurveyed lands not covered by protracted surveys by metes and bounds, and further states that there are no settlers on unsurveyed lands described herein.

6. Offeror ☐ is ☐ is not the sole party in interest in this offer and lease, if issued. *(If not the sole party in interest, statements should be filed as prescribed in Item 6 of the Special Instructions.)*

7. Offeror's signature to this offer shall also constitute offeror's signature to, and acceptance of, this lease and any amendment thereto that may cover any land described in this offer open to lease application at the time the offer was filed but omitted from this lease for any reason, or signature to, or acceptance of, any separate lease for such land. The offeror further agrees that (a) this offer cannot be withdrawn, either in whole or in part, unless the withdrawal is received by the land office before this lease, an amendment to this lease, or a separate lease, whichever covers the land described in the withdrawal, has been signed in behalf of the United States, and (b) this offer and lease shall apply only to lands not within a known geologic structure of a producing oil or gas field at the time the offer is filed.

8. If this lease form does not contain all of the terms and conditions of the lease form in effect at the date of filing, the offeror further agrees to be bound by the terms and conditions contained in that form.

9. It is hereby certified that the statements made herein are complete and correct to the best of offeror's knowledge and belief and are made in good faith.

Offeror duly executed this instrument this ..... day of ....., 19.....

.....
(Lessee signature)

.....
(Lessee signature)

.....
(Attorney-in-fact)

This lease for the lands described in item 3 above is hereby issued, subject to the provisions of the offer and on the reverse side hereof.

THE UNITED STATES OF AMERICA

By .....
(Signing officer)

Effective date of lease .....

.....
(Title)

.....
(Date)

THIS OFFER MAY BE REJECTED AND RETURNED TO THE OFFEROR AND WILL AFFORD THE OFFEROR NO PRIORITY IF IT IS NOT PROPERLY FILLED IN AND EXECUTED OR IF IT IS NOT ACCOMPANIED BY THE REQUIRED DOCUMENTS OR PAYMENTS. SEE ITEM 9 OF GENERAL INSTRUCTIONS

18 U. S. C. sec. 1001 makes it a crime for any person knowingly and willfully to make to any Department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

This form may be reproduced provided that the copies are exact reproductions on one sheet of both sides of this official form, in accordance with the provisions of 43 CFR 192.42 (a).

LEASE TERMS

Sec. 1. *Rights granted.* The lessee is granted the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium, in the lands leased, together with the right to construct and maintain thereon all works, buildings, plants, waterways, roads, telegraph or telephone lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of [illegible] years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistent with the terms of this lease.

Sec. 2. The lessee agrees:

(a) *Rentals.* (1) To pay in advance [illegible] and the conservation regulations and until such land is included in a unit, on the land under this lease. (2) To maintain any [illegible] by the lessee as a condition for the issuance of this lease. (3) To furnish a bond in a satisfactory amount of $2 per acre annual rental but not less than $1,000 nor more than $5,000, upon the inclusion of any part of the leased land in the acreage [illegible] structure of a producing oil or gas field. (4) To furnish prior to beginning of drilling operations and maintain at all times thereafter required by the lessor a bond in the penal sum of $10,000 with approved surety, or with deposit of United States bonds as security therefor, conditioned upon compliance with the terms of this lease, unless a bond in that amount is already being maintained or unless such a bond furnished to an operator of the lease is accepted. (5) Until a general lease bond is filed to furnish and maintain a bond in the penal sum of not less than $1,000 in those cases in which a bond is required by law for the protection of the surface of surface rights. In lieu of any of the bonds described herein, the lessee may file such other bond as the regulations may permit.

(b) *Cooperative or unit plan.*—Within 30 days of demand, or, if the leased land is committed to an approved unit or cooperative plan and such plan is terminated prior to the expiration of this lease, within 30 days of demand made thereafter, to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool, or part thereof embracing the lands included herein as the Secretary of the Interior may then determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

(c) *Wells.*—(1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease, or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director; (2) at the election of the lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, which is authorized and sanctioned by applicable law or by the Secretary of the Interior; and (3) promptly after due notice in writing to drill and produce such other wells as the Secretary of the Interior may reasonably require in order that the leased premises may be properly and timely developed and produced in accordance with good operating practice.

(d) *Rentals and royalties.*—(1) To pay rentals and royalties in amount or value of production removed or sold from the leased lands as follows:

Rentals.—To pay the lessor in advance an annual rental at the following rates:

(a) If the lands are wholly outside the known geologic structure of a producing oil or gas field
  (i) For each lease year a rental of 50 cents per acre or fraction of an acre.
(b) If the lands are wholly or partly within the known geologic structure of a producing oil or gas field:
  (ii) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands leased, $2 per acre or fraction of an acre.
  (iii) If this lease is committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, the rental prescribed for the respective lease years in subparagraph (a) of this section, shall apply to the acreage not within a participating area.

Minimum royalty.—Commencing with the lease year beginning on or after a discovery on the leased land, to pay the lessor in lieu of rental, a minimum royalty of $1 per acre or fraction thereof at the expiration of each lease year, or the difference between the actual royalty paid during the year if less than $1 per acre, and the prescribed minimum royalty of $1 per acre, provided that if this lease is unitized, the minimum royalty shall be payable only on the participating acreage and rental shall be payable on the nonparticipating acreage as provided in subparagraph (b) (ii) above.

Royalty on production.—To pay the lessor 12½ percent royalty on the production removed or sold from the leased lands computed in accordance with the Oil and Gas Operating Regulations (30 CFR Pt. 221).

(2) It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices, and to other relevant matters; and, whenever appropriate, after notice and opportunity to be heard.

(3) When paid in value, such royalties on production shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. When paid in amount of production, such royalty products shall be delivered in merchantable condition on the premises where produced without cost to lessor, unless otherwise agreed to by the parties hereto, at such times and in such tanks provided by the lessee as reasonably may be required by the lessor, but in no case shall the lessee be required to hold such royalty oil or other products in storage beyond the last day of the calendar month next following the calendar month in which produced nor be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which he has no control.

(4) Rentals or minimum royalties may be waived, suspended or reduced and royalties on the entire leasehold or any portion thereof segregated for royalty purposes may be reduced if the Secretary of the Interior finds that, for the purpose of encouraging the greatest ultimate recovery of oil or gas and in the interest of conservation of natural resources, it is necessary, in his judgment, to do so in order to promote development, or because the lease cannot be successfully operated under the terms fixed herein.

(e) *Payments.* Unless otherwise directed by the Secretary of the Interior, to make rental, royalty, or other payments to the lessor, to the order of the Bureau of Land Management at the places mentioned in the regulation 43 CFR 191.12. If there is no well on the leased lands capable of producing oil or gas in paying quantities, the failure to pay rental on or before the anniversary date shall automatically terminate the lease by operation of law. However, if the time for payment falls on a day in which the proper office to receive payment is closed, payment shall be deemed timely if made on the next official working day.

(f) *Contracts for disposal of products.*—To file with the Oil and Gas Supervisor of the Geological Survey not later than 30 days after the effective date thereof any contract, or evidence of other arrangement, for the sale or disposal of oil, gas, natural gasoline, and other products of the leased land, *Provided*, That nothing in any such contract or other arrangement shall be construed as modifying any of the provisions of this lease, including, but not limited to, provisions relating to gas waste, taking royalty in kind, and the method of computing royalties due as based on a minimum valuation and in accordance with the Oil and Gas Operating Regulations.

(g) *Statements, plats and reports.* At such times and in such form as the lessor may prescribe, to furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amount used for production purposes or unavoidably lost, a plat showing development work and improvements on the leased lands, and a report with respect to stockholders' investments, depreciation and cost.

(h) *Well records.* To keep a daily drilling record, a log, and complete information on all well surveys and tests in form acceptable to or prescribed by the lessor of all wells drilled on the leased lands and an acceptable record of all subsurface investigations affecting said lands and to furnish them, or copies thereof, to the lessor when required. All information obtained under this paragraph, upon the request of lessee, shall not be open to inspection by the public until the expiration of the lease.

(i) *Inspection.* To keep open at all reasonable times for the inspection of any duly authorized officer of the Department the leased premises and all wells, improvements, machinery, and fixtures thereon and all books, accounts, maps and records relative to operations and surveys or investigations on the leased lands or under the lease. All information obtained pursuant to any such inspection, upon the request of the lessee, shall not be open to inspection by the public until the expiration of the lease.

(j) *Diligence, prevention of waste, health and safety of workmen.* To exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the lessor; to carry on all operations in accordance with approved methods and practice as provided in the Oil and Gas Operating Regulations, having due regard for the prevention of waste of oil or gas or damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations, and for the health and safety of workmen and employees; to plug properly and effectively all wells drilled in accordance with the provisions of this lease or of any prior lease or permit upon which the right to this lease was predicated before abandoning the same; to carry out at expense of the lessee all reasonable orders of the lessor relative to the matters in this paragraph, and that on failure of the lessee so to do the lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the lessee's cost: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(k) *Taxes and wages, freedom of purchase.*—To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property, or assets of the lessee, to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(l) *Nondiscrimination Clauses.*—In connection with the performance of work under this contract, the lessee agrees as follows:

(1) The lessee will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The lessee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Nondiscrimination clause.

(2) The lessee will, in all solicitations or advertisements for employees placed by or on behalf of the lessee, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The lessee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the lessee's commitments under this Nondiscrimination clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The lessee will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The lessee will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the lessee's noncompliance with the Nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and the lessee may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanction may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The lessee will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The lessee will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however*, that in the event the lessee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the lessee may request the United States to enter into such litigation to protect the interests of the United States.

(m) *Assignment of oil and gas lease or interest therein.*—As required by applicable law, to file for approval by the lessor any instrument of transfer made of this lease or any interest therein, including assignments of record title, operating agreements and subleases, working or royalty interests, within 90 days from the date of final execution thereof.

(n) *Pipelines to purchase or convey at reasonable rates and without discrimination.*—If owner, or operator, or owner of a controlling interest in any pipeline or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipeline, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products under the provisions of the act, or under the provisions of the act of August 7, 1947 (61 Stat. 913, 30 U. S. C. sec. 351).

(o) *Lands patented with oil and gas deposits reserved to the United States.*—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas thereto, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(p) *Reserved or segregated lands.*—If any of the land included in this lease is embraced in a reservation or segregated for any particular purpose, to conduct operations thereunder in conformity with such requirements as may be made by the Director, Bureau of Land Management, for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purposes of this lease, which latter shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.

(q) *Protection of surface, mineral resources and improvements.* To take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) Causing or contributing to soil erosion or damaging any forage and timber growth thereon, (2) polluting the waters of reservoirs, springs, streams or wells, (3) damaging crops in tilling forage timber or improvements of a surface owner, or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees, and upon conclusion of operations, so far as is reasonably feasible to restore the surface to its former condition. The lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

(r) *Overriding royalties.* Not to create overriding royalties in excess of five percent except as otherwise authorized by the regulations.

(s) *Deliver premises in cases of forfeiture.* To deliver up to the lessor in good order and condition the land leased (including all improvements which are necessary for the preservation of producing wells).

Sec. 3. The lessor reserves:

(a) *Easements and rights-of-way.* The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in the act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) *Disposition of surface.*—The right to lease, sell, or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the lessee in the extraction and removal of the oil and gas therein, or to dispose of any resource in such lands which will not unreasonably interfere with operations under this lease.

(c) *Monopoly and fair prices.*—Full power and authority to promulgate and enforce all orders necessary to insure the sale of the production of the leased lands to the United States and to the public at reasonable prices, to protect the interests of the United States, to prevent monopoly, and to safeguard the public welfare.

(d) *Helium.* Pursuant to section 1 of the act, as amended, the ownership and the right to extract helium from all gas produced under this lease, subject to such rules and regulations as shall be prescribed by the Secretary of the Interior. In case the lessee elects to take the helium the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor at any point on the leased premises in the manner required by the lessor for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof. The lessee shall not suffer a diminution in value of the gas from which the helium has been extracted, unless otherwise, for which he is not reasonably compensated, save for the value of the helium extracted. The lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

(e) *Taking of royalties.*—All rights pursuant to section 36 of the act, to take royalties in amount or in value of production.

(f) *Casing.*—All rights pursuant to section 40 of the act to purchase casing and lease or operate valuable water wells.

Sec. 4. *Drilling and producing restrictions.*—It is agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. After unitization, the Secretary of the Interior, or any person, committee, or State or Federal officer or agency so authorized in the unit plan, may alter or modify from time to time, the rate of prospecting and development and the quantity and rate of production from the lands covered by this lease.

Sec. 5. *Surrender and termination of lease.*—The lessee may surrender this lease or any legal subdivision thereof by filing in the proper land office a written relinquishment, in triplicate, which shall be effective as of the date of filing subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals and royalties and to place all wells on the land to be relinquished in condition for suspension or abandonment in accordance with the applicable lease terms and regulations.

Sec. 6. *Purchase of materials, etc., on termination of lease.*—Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the lessee shall have the privilege at any time within a period of 90 days thereafter of removing from the premises all machinery, equipment, tools, and materials other than improvements needed for producing wells. Any materials, tools, appliances, machinery, structures, and equipment subject to removal as above provided, which are allowed to remain on the leased lands shall become the property of the lessor on expiration of the 90-day period or such extension thereof as may be granted because of adverse climatic conditions throughout said period: *Provided*, That the lessee shall remove any or all of such property where so directed by the lessor.

Sec. 7. *Proceeding in case of default.* If the lessee shall not comply with any of the provisions of the act or the regulations thereunder or of the lease, or make default in the performance or observance of any of the terms hereof (except that of payment of annual rental which will result in the automatic termination of the lease), and such default shall continue for a period of 30 days after service of written notice thereof by the lessor, this lease may be canceled by the Secretary of the Interior in accordance with section 31 of the act, except that if this lease covers lands known to contain valuable deposits of oil or gas, the lease may be canceled only by judicial proceedings in the manner provided in section 31 of the act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise have. Upon cancellation of this lease, any casing, material, or equipment determined by the lessor to be necessary for use in plugging or preserving any well drilled on the leased land shall become the property of the lessor. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Sec. 8. *Heirs and successors-in-interest.*—It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

Sec. 9. *Unlawful interest.*—It is also further agreed that no Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4 (a) (1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of Sec. 3741 of the Revised Statutes of the United States, as amended (41 U. S. C. Sec. 22) and Secs. 431, 432 and 433, Title 18 U. S. Code, relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

INSTRUCTIONS

A. GENERAL INSTRUCTIONS

1. This offer must be filled in on a typewriter or printed plainly in ink and must be signed in ink.

2. This form is to be used in offering to lease noncompetitively public domain lands or oil and gas deposits reserved to the United States in disposals of such lands for the purpose of drilling, mining, extracting, removing and disposing of oil and gas deposits, except helium. This form should not be used in offering to lease acquired lands or lands on a known geologic structure of a producing oil or gas field.

3. Offers to lease may be made by individuals 21 years of age or over who are citizens of the United States, and by corporations, partnerships or associations.

4. This offer must be prepared in quintuplicate and filed in the proper land office. The term "filing" means the actual receipt of the offer in the proper land office. If the land is in a State for which there is no land office, the offer must be filed with the Bureau of Land Management, Department of the Interior, Washington 25, D. C. See 43 CFR 192.42(b). If less than five copies are filed, the offeror will have 30 days from the date of first filing to file the other required copies, failing in which the offer will be rejected and returned to the offeror and will afford no priority.

5. The offeror shall mark one of the copies first filed at the top with the word "original." If that is not done, the manager will so mark one copy. If there is any variation in the land descriptions among the five copies, the one marked "original" shall govern as to the lands covered by the lease.

6. If additional space is needed in furnishing any of the required information it should be prepared on additional sheets, initialed and attached and made part of this offer to lease, such additional sheets to be attached to each copy of the form submitted.

7. If any of the land described in item 2 of the offer is open to oil and gas lease filing when the offer is filed but is omitted from the lease for any reason and thereafter becomes available for leasing to the offeror, the original lease will be amended to include the omitted land, unless, before the issuance of the amendment on Form 4-1163, the land office receives the withdrawal of the offer as to such land or an election to receive a separate lease to be dated in accordance with 43 CFR 192.40a, in which case such separate lease will be issued. If the lease is amended the rental charged and the lease term will be the same as though the added land had been included in the original lease when it was issued.

8. As an incident to the assignment of the whole interest in all or any part of the lease, the lessee may assign the whole interest in all or any part of the offer. As an incident to the assignment of an undivided fractional interest in the whole lease, the lessee may assign an undivided fractional interest in the whole offer. Applications for approval of assignments of an offer must include a statement that the assignee agrees to be bound by the offer to the extent it is assigned and must be signed by the assignee. In other instances assignments of the offer will not be approved prior to the issuance of a lease for the lands or deposits covered by said assignments.

9. The offer will be rejected and returned to the offeror and will afford the [illegible] part before a lease is issued if the offer is [illegible] requirements of section 192.42a or the lands are not entirely within an area of 6 miles square or an area of 6 surveyed sections in length or width. (b) The total acreage exceeds 2,560 acres, except where the rule of approximation applies or is less than 640 acres or the equivalent of a section and is not within the exceptions in 43 CFR 192.42(d). This does not apply where the total acreage is in error by not more than 10 percent. (c) The full filing fee and the first year's rental do not accompany the offer, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest legal subdivision, except where the rental is in error by not more than 10 percent. (d) Except if the power of attorney is within the purview of paragraph 4 CFR 192.42(e)(4)(i), the offer is signed by an attorney in fact or agent in behalf of the offeror and the offer is not accompanied by a statement over the offeror's own signature with respect to holdings and citizenship and by the evidence required by 43 CFR 192.42(e)(4), and such statement by the principal (offeror) is not filed within 15 days after the filing of the offer. (e) The offer is signed by a guardian or trustee in behalf of a minor and is not accompanied by the evidence required by 43 CFR 192.42(e)(4)(i). (f) Less than five copies of the offer are filed and the copies lacking are not received in the land office before the expiration of 30 days from the date of the copies first filed, or (g) There is noncompliance with item (5) (a) and 5(e) of the Special Instructions. The offeror will be given an opportunity to file a new offer within 30 days from service of the rejection, and the fee and rental payments on the old offer will be applied to the new offer if the new offer shows the serial and receipt numbers of the old offer. The advance rental will be returned unless within the 30-day period another offer is filed.

B. SPECIAL INSTRUCTIONS

Item 2.—Total area of land requested should be shown in acres in space provided at bottom of item 2. That area, except where the rule of approximation applies, must not exceed 2,560 acres or be less than 640 acres or the equivalent of a section except as provided in 43 CFR 192.42 (d). All of the land must be within a 6-mile square or an area of 6 surveyed sections in length or width. The description of surveyed and unsurveyed lands, or lands covered by protracted surveys must conform to the provisions of 43 CFR 192.42a.

Item 3.—This space is not to be filled in. When lease is issued this space will contain the identification of the leased area and total acres.

Item 4.—The total amount remitted should include a $10 filing fee and the first year's rental of the land requested at the rate of 50 cents an acre or fraction thereof, any fraction being counted as an additional acre. The $10 filing fee is retained as a service charge, even in those cases where the offer to lease is completely rejected. In order to protect the offeror's priorities with respect to the land requested, it is important that the rental payment submitted with the offer be sufficient to cover all the land requested at the rate of 50 cents an acre or fraction thereof. If the land requested includes lots or irregular quarter-quarter sections, the exact area of which is not known to the offeror, rental may be submitted for the purpose of the offer on the basis of each such lot or quarter-quarter section containing 40 acres. If the offer is withdrawn [illegible] will be returned. Where at the time the lease is to be issued, the land applied for or any part of it is within a known geologic structure of a producing oil or gas field, the lessee will be billed for the additional rental of $1.50 an acre on all the leased land as the yearly rental on such lands is $2 per acre.

Item 5 (a).—Offeror will indicate whether a citizen by birth or naturalization. If production is obtained under this lease or allocated to it, the citizenship status of the lessee will be verified.

If offeror is an unincorporated association (including a partnership), the offer must be accompanied by a statement giving the same showing as to citizenship and holdings of its members as required of an individual.

If offeror is a corporation it must submit a statement containing the following information: the State in which it is incorporated; that it is authorized to hold oil and gas leases and that the officer executing the lease is authorized to act on behalf of the corporation in such matters, the percentage of the voting stock and of all of the stock owned by aliens or those having addresses outside the United States. Where such ownership is over 10 percent, additional information may be required by the Bureau before the lease is issued or when production is obtained. If any appreciable percentage of the stock is held by aliens of the excepted class the application will be denied. If 20 percent or more of the stock of any class is owned or controlled by or on behalf of any one stockholder a separate showing of his citizenship and holdings must be furnished.

Item 5 (b). Acreage included in unitized leases and leases subject to certain development contracts approved by the Secretary under authority of section 17 (b) is not chargeable.

Item 5 (c).—Whenever applicable the stipulations referred to will be made a part of this lease and will be furnished the lessee with the lease when issued. The forms covering them with a brief description are as follows: 4-216 Stipulations for lands where the surface control is under the jurisdiction of the Department of Agriculture, 4-467 Lands potentially irrigable, 4-467 (a) Lands within the flow limits of a reservoir site; 4-467 (b) Lands within the drainage area of a constructed reservoir, 4-1223 Lands withdrawn for power purposes, and 4-1383, Wildlife Refuge, Game Range, and Coordination Lands. Whenever other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease.

Item 5 (e). If there are letters attach a sheet giving the name and post-office address of each and description of the lands claimed by metes and bounds or protracted surveys and approximate legal subdivisions.

Item 6.—Offeror must indicate whether or not he is the sole party in interest in this offer and the lease, if issued. If not the sole party in interest, the offeror must submit at the time the offer is filed a signed statement setting forth the names of the other interested parties. If there are other parties interested in the offer, a separate statement must be signed by them and the offeror, setting forth the nature and extent of the interest of each, the nature of the agreement between them if oral, and a copy of the agreement if written. Such separate statement and written agreement, if any, must be filed within 15 days after the filing of the lease offer. All interested parties must furnish their qualifications to hold such lease interest.

Form 4–213
(September 1961)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

OIL AND GAS LEASE
(COMPETITIVE – PUBLIC DOMAIN LANDS)

Act of February 25, 1920 (41 Stat. 437) as amended (30 U.S.C. Sec. 181 *et seq.*)

Land Office
Serial Number

THIS INDENTURE OF LEASE, entered into, as of , 19 , by and between the UNITED STATES OF AMERICA, through the Bureau of Land Management, hereinafter called the Lessor, and

hereinafter called the Lessee, under, pursuant, and subject to the terms and provisions of the act of February 25, 1920, (41 Stat. 437) as amended (30 U.S.C. Sec. 181 *et seq.*), hereinafter referred to as the act, and to all reasonable regulations of the Secretary of the Interior now or hereafter in force when not inconsistent with any express and specific provisions herein, which are made a part hereof,

WITNESSETH:

SEC. 1. *Rights of Lessee.* That the Lessor, in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the Lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits, except helium gas, in or under the following-described tracts of land situated in the field:

containing acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipelines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of five (5) years, and so long thereafter as oil or gas is produced in paying quantities; subject to any unit agreement heretofore or hereafter approved by the Secretary of the Interior, the provisions of said agreement to govern the lands subject thereto where inconsistencies with the terms of this lease occur.

SEC. 2. In consideration of the foregoing, the Lessee agrees:

(a) *Bonds.* (1) To maintain any bond furnished by the Lessee as a condition for the issuance of this lease.

(2) To furnish prior to beginning of drilling operations and maintain at all times thereafter as required by the Lessor a bond in the penal sum of $10,000 with approved corporate surety, or with deposit of United States bonds as surety therefor, conditioned upon compliance with the terms of this lease, unless a bond in that amount is already being maintained or unless such a bond furnished by an operator of the lease is accepted, or unless a bond has been filed under 43 CFR 192.100(e) applicable to this lease.

(b) *Cooperative or unit plan.* Within thirty (30) days of demand, or, if the leased land is committed to an approved unit or cooperative plan and such plan is terminated prior to the expiration of this lease, within thirty (30) days of demand made thereafter, to subscribe to and to operate under such reasonable cooperative or unit plan for the development and operation of the area, field, or pool, or part thereof, embracing the lands included herein as the Secretary of the Interior may then determine to be practicable and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

(c) *Wells.* (1) To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the Lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the Lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director; (2) at the election of the Lessee, to drill and produce other wells in conformity with any system of well spacing or production allotments affecting the field or area in which the leased lands are situated, which is authorized and sanctioned by applicable law or by the Secretary of the Interior; and (3) promptly after due notice in writing to drill and produce such other wells as the Secretary of the Interior may reasonably require in order that the leased premises may be properly and timely developed and produced in accordance with good operating practice.

(d) *Rentals and royalties.* (1) To pay rentals and royalties in amount or value of production removed or sold from the leased lands as set forth in the rental and royalty schedule attached to and made a part hereof.

(2) It is expressly agreed that the Secretary of the Interior may establish reasonable minimum values for purposes of computing royalty on any or all oil, gas, natural gasoline, and other products obtained from gas, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the Lessee, to posted prices, and to other relevant matters and, whenever appropriate, after notice and opportunity to be heard.

(3) When paid in value, such royalties on production shall be due and payable monthly on the last day of the calendar month next following the calendar month in which produced. When paid in amount of production, such royalty products shall be delivered in merchantable condition on the premises where produced without cost to Lessor, unless otherwise agreed to by the parties hereto, at such times and in such tanks provided by the Lessee as reasonably may be required by the Lessor, but in no case shall the Lessee be required to hold such royalty oil or other products in storage beyond the last day of the calendar month next following the calendar month in which produced nor be responsible or held liable for the loss or destruction of royalty oil or other products in storage from causes over which he has no control.

(4) Rentals or minimum royalties may be waived, suspended or reduced and royalties on the entire leasehold or any portion thereof segregated for royalty purposes may be reduced if the Secretary of the Interior finds that, for the purpose of encouraging the greatest ultimate recovery of oil or gas and in the interest of conservation of natural resources, it is necessary, in his judgment, to do so in order to promote development, or because the lease cannot be successfully operated under the terms fixed herein.

(e) *Payments.* Unless otherwise directed by the Secretary of the Interior, to make rental, royalty, or other payments to the Lessor, to the order of the Bureau of Land Management at the places mentioned in the regulation 43 CFR 191.12. If there is no well on the leased lands capable of producing oil or gas in paying quantities, the failure to pay rental on or before the anniversary date shall automatically terminate the lease by operation of law. However, if the time for payment falls on a day in which the proper office to receive payment is closed, payment shall be deemed timely if made on the next official working day.

(f) *Contracts for disposal of products.* To file with the Oil and Gas Supervisor of the Geological Survey not later than thirty (30) days after the effective date thereof any contract, or evidence of other arrangement, for the sale or disposal of oil, gas, natural gasoline, and other products of the leased land: *Provided, That* nothing in any such contract or other arrangement shall be construed as modifying any of the provisions of this lease, including, but not limited to, provisions relating to gas waste, taking royalty in kind, and the method of computing royalties due as based on a minimum valuation and in accordance with the Oil and Gas Operating Regulations.

(g) *Statements, plats, and reports.* At such times and in such form as the Lessor may prescribe, to furnish detailed statements showing the amounts and quality of all products removed and sold from the lease, the proceeds therefrom, and the amount used for production purposes or unavoidably lost; a plat showing development work and improvements on the leased lands; and a report with respect to stockholders, investments, depreciation, and costs.

(h) *Well records.* To keep a daily drilling record, a log, and complete information on all well surveys and tests in form acceptable to or prescribed by the Lessor of all wells drilled on the leased lands, and an acceptable record of all subsurface investigations affecting said lands, and to furnish them, or copies thereof, to the Lessor when required. All information obtained under this paragraph, upon the request of Lessee, shall not be open to inspection by the public until the expiration of the lease.

(i) *Inspection.* To keep open at all reasonable times for the inspection of any duly authorized officer of the Department, the leased premises and all wells, improvements, machinery, and fixtures thereon and all books, accounts, maps and records relative to operations and surveys or investigations on the leased lands or under the lease. All information obtained pursuant to any such inspection, upon the request of the Lessee, shall not be open to inspection by the public until the expiration of the lease.

(j) *Diligence, prevention of waste, health and safety of workmen.* To exercise reasonable diligence in drilling and producing the wells herein provided for unless consent to suspend operations temporarily is granted by the Lessor; to carry on all operations in accordance with approved methods and practice as provided in the Oil and Gas Operating Regulations, having due regard for the prevention of waste of oil or gas or damage to deposits or formations containing oil, gas, or water or to coal measures or other mineral deposits, for conservation of gas energy, for the preservation and conservation of the property for future productive operations, and for the health and safety of workmen and employees; to plug properly and effectively all wells drilled in accordance with the provisions of this lease or of any prior lease or permit upon which the right to this lease was predicated before abandoning the same; to carry out at expense of the Lessee all reasonable orders of the Lessor relative to the matters in this paragraph, and that on failure of the Lessee so to do the Lessor shall have the right to enter on the property and to accomplish the purpose of such orders at the Lessee's cost: *Provided, That* the Lessee shall not be held responsible for delays or casualties occasioned by causes beyond Lessee's control.

(k) *Taxes and wages, freedom of purchase.* To pay when due, all taxes lawfully assessed and levied under the laws of the State or the United States upon improvements, oil and gas produced from the lands hereunder, or other rights, property or assets of the Lessee; to accord all workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at least twice each month in the lawful money of the United States.

(l) *Nondiscrimination clauses.* In connection with the performance of work under this contract, the Lessee agrees as follows:

(1) The Lessee will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Lessee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The Lessee will, in all solicitations or advertisements for employees placed by or on behalf of the Lessee, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The Lessee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the Lessee's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Lessee will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The Lessee will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting

agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Lessee's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the Lessee may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The Lessee will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Lessee will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however,* that in the event the Lessee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Lessee may request the United States to enter into such litigation to protect the interests of the United States.

(m) *Assignment of oil and gas lease or interest therein.* As required by applicable law, to file for approval by the Lessor any instrument of transfer made of this lease or any interest therein, including assignments of record title, operating agreements and subleases, working or royalty interests, within ninety (90) days from the date of final execution thereof.

(n) *Pipelines to purchase or convey at reasonable rates and without discrimination.* If owner, or operator, or owner of a controlling interest in any pipeline or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipeline, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products under the provisions of the act, or under the provisions of the act of August 7, 1947 (61 Stat. 913; 30 U.S.C., Sec. 351).

(o) *Lands patented with oil and gas deposits reserved to the United States.* To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(p) *Reserved or segregated lands.* If any of the land included in this lease is embraced in a reservation or segregated for any particular purpose, to conduct operations thereunder in conformity with such requirements as may be made by the Director, Bureau of Land Management, for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purpose of this lease, which latter shall be regarded as the dominant use unless otherwise provided herein or separately stipulated.

(q) *Protection of surface, natural resources and improvements.* To take such reasonable steps as may be needed to prevent operations from unnecessarily: (1) causing or contributing to soil erosion or damaging any forage and timber growth thereon; (2) polluting the waters of reservoirs, springs, streams, or wells; (3) damaging crops, including forage, timber, or improvements of a surface owner; or (4) damaging range improvements whether owned by the United States or by its grazing permittees or lessees; and upon conclusion of operations, so far as can reasonably be done, to restore the surface to its former condition. The Lessor may prescribe the steps to be taken and restoration to be made with respect to lands of the United States and improvements thereon.

(r) *Overriding royalties.* Not to create overriding royalties in excess of five percent except as otherwise authorized by the regulations.

(s) *Deliver premises in cases of forfeiture.* To deliver up to the Lessor in good order and condition the land leased including all improvements which are necessary for the preservation of producing wells.

SEC. 3. The Lessor reserves:

(a) *Easements and rights-of-way.* The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in the act, and the treatment and shipment of products thereof by or under authority of the Government, its Lessees or Permittees, and for other public purposes.

(b) *Disposition of surface.* The right to lease, sell, or otherwise dispose of the surface of the leased lands under existing law or laws hereafter enacted, insofar as said surface is not necessary for the use of the Lessee in the extraction and removal of the oil and gas therein, or to dispose of any resource in such lands which will not unreasonably interfere with operations under this lease.

(c) *Monopoly and fair prices.* Full power and authority to promulgate and enforce all orders necessary to insure the sale of the production of the leased lands to the United States and to the public at reasonable prices, to protect the interests of the United States, to prevent monopoly, and to safeguard the public welfare.

(d) *Helium.* Pursuant to Sec. 1 of the act, as amended, the ownership and the right to extract helium from all gas produced under this lease, subject to such rules and regulations as shall be prescribed by the Secretary of the Interior. In case the Lessor elects to take the helium the Lessee shall deliver all gas containing same, or portion thereof desired, to the Lessor at any point on the leased premises in the manner required by the Lessor, for the extraction of the helium in such plant or reduction works for that purpose as the Lessor may provide, whereupon the residue shall be returned to the Lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof. The Lessee shall not suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which he is not reasonably compensated, save for the value of the helium extracted. The Lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

(e) *Taking of royalties.* All rights pursuant to Sec. 36 of the act, to take royalties in amount or in value of production.

(f) *Casing.* All rights pursuant to Sec. 40 of the act to purchase casing, and lease or operate valuable water wells.

SEC. 4. *Drilling and producing restrictions.* It is agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. After unitization, the Secretary of the Interior, or any person, committee, or State or Federal officer or agency so authorized in the unit plan, may alter or modify, from time to time, the rate of prospecting and development and the quantity and rate of production from the lands covered by this lease.

SEC. 5. *Surrender and termination of lease.* The Lessee may surrender this lease or any legal subdivision thereof by filing in the proper Land Office a written relinquishment, in triplicate, which shall be effective as of the date of filing subject to the continued obligation of the Lessee and his

surety to make payment of all accrued rentals and royalties and to place all wells on the land to be relinquished in condition for suspension or abandonment in accordance with the applicable lease terms and regulations.

SEC. 6. *Purchase of materials, etc., on termination of lease.* Upon the expiration of this lease, or the earlier termination thereof pursuant to the last preceding section, the Lessee shall have the privilege at any time within a period of ninety (90) days thereafter of removing from the premises all machinery, equipment, tools, and materials other than improvements needed for producing wells. Any materials, tools, appliances, machinery, structures, and equipment subject to removal as above provided, which are allowed to remain on the leased lands shall become the property of the Lessor on expiration of the 90-day period or such extension thereof as may be granted because of adverse climatic conditions throughout said period: *Provided, That* the Lessee shall remove any or all of such property where so directed by the Lessor.

SEC. 7. *Proceedings in case of default.* If the Lessee shall not comply with any of the provisions of the act or the regulations thereunder or of the lease, or make default in the performance or observance of any of the terms hereof (except that of payment of annual rental which results in the automatic termination of the lease) and such default shall continue for a period of thirty (30) days after service of written notice thereof by the Lessor, this lease may be canceled by the Secretary of the Interior in accordance with Sec. 31 of the act, except that if this lease covers lands known to contain valuable deposits of oil or gas, the lease may be canceled only by judicial proceedings in the manner provided in Sec. 31 of the act; but this provision shall not be construed to prevent the exercise by the Lessor of any legal or equitable remedy which the Lessor might otherwise have. Upon cancellation of this lease, any casing, material, or equipment determined by the Lessor to be necessary for use in plugging or preserving any well drilled on the leased land shall become the property of the Lessor. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

SEC. 8. *Heirs and successors in interest.* It is further agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

SEC. 9. *Unlawful interest.* It is also further agreed that no Member of, or Delegate to, Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior, except as provided in 43 CFR 7.4(a)(1), shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom; and the provisions of Sec. 3741 of the Revised Statutes of the United States, as amended (41 U.S.C. Sec. 22) and Secs. 431, 432, and 433, Title 18 U.S.C., relating to contracts, enter into and form a part of this lease so far as the same may be applicable.

THE UNITED STATES OF AMERICA

_____
(Lessee Signature)

By _____ _____
(Signing Officer)

_____
(Lessee Signature)

_____
(Title)

_____
(Date)

GPO 649585

APPENDIX

III

OIL, GAS AND MINERAL LEASE

THIS AGREEMENT, Made this the_____day of_____, 19_____, between _____

_____

_____

_____hereinafter called lessor (whether one or more) and

_____ hereinafter called lessee:

1. Lessor, in consideration of _____Dollars ($_____), in hand paid, the receipt and sufficiency of which is hereby acknowledged, and of the royalties herein provided and of the agreements of the lessee herein contained, hereby grants, leases and lets exclusively unto lessee for the purpose of investigating, making seismograph or other geophysical or geological tests and surveys, exploring, prospecting, drilling, mining and operating for and producing oil, gas and all other minerals, injecting gas, waters, other fluids, and air into sub-surface strata, laying pipe lines, storing oil, building tanks, power stations, telephone lines, and other structures and things thereon to produce, save, take care of, treat, process, store and transport

sold minerals and other products manufactured therefrom the following described land in _____ County, Texas, to-wit:

In the event a resurvey of said lands shall reveal the existence of excess and/or vacant lands lying adjacent to the above described land and the lessor, his heirs or assigns shall by virtue of his ownership of the lands above described have preference right to acquire said excess and/or vacant lands, then in that event this lease shall cover and include such excess and/or vacant lands which the lessor, his heirs or assigns shall have the preference right to acquire by virtue of his ownership of the land above described as and when acquired by the lessor; and the lessee shall pay the lessor for such excess and/or vacant lands at the same rate per acre as the cash consideration paid for the acreage hereinabove mentioned. For the purpose of calculating the rental payments hereinafter provided for, said land is

estimated to comprise _____ acres, whether it actually comprises more or less.

2. This lease shall remain in force for a term of ten years from this date (called "primary term") and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of them is produced from said land or land with which said land is consolidated.

3. The royalties to be paid by lessee are: (a) on all saved at the well, one-eighth (1/8) of that produced and saved from the land, same to be delivered at the wells or to the credit of lessor in the pipe line to which the wells may be connected; lessor's interest in either case shall bear its proportion of any expense for treating oil to make it marketable as crude, and of any trucking expenses incurred in marketing; (b) on gas, including casinghead gas and all gaseous substances produced from said land and sold or used off the premises or in the manufacture of gasoline or other products therefrom, the market value at the mouth of the well of one-eighth (1/8) of the gas so sold or used, provided that on gas sold at the well, the royalty will be one-eighth (1/8) of the amount realized from such sale; (c) on all other minerals mined and marketed, one-eighth (1/8) either in kind or value at the well or mine, at lessee's election, except on sulphur, the royalty shall be One Dollar ($1.00) per long ton; (d) where gas from a gas well, or wells, on said land or on land with which said land is consolidated, is not sold or used, whether before or after the expiration of the primary term, lessee shall, unless and until this lease be maintained in force and effect under other of its provisions, pay or tender to lessor, or pay or tender or deposit into the depositary bank named in Paragraph 4 hereof, or any successor thereof or named therefor, in the manner therein provided, as royalty, an amount equal to the delay rental provided for in this lease for acreage then held under this lease by the party making payment or tender, same being payable annually at the end of each year during which such gas is not sold or used, computing such one year periods from the date when the last of all gas wells located on the land above described, or on land with which it is consolidated, is finally shut in. Should the shut-in period be less than one year, lessee shall pay as royalty, in the manner hereinabove provided, a prorata part of the annual amount provided for, computed to the nearest month, same being payable at the end of one year from the commencement of the shut-in period. Pending and until the payable date of, and while said royalty is so paid, tendered or deposited, it shall be considered and held under all provisions of this lease, that gas is being produced in paying quantities from the leased premises. For the purpose of this paragraph, the term gas well shall include a well, or wells, capable of producing natural gas, condensate or any other gaseous substance, and wells classified as gas wells by any governmental authority.

4. If operations for drilling or mining are not commenced on said land or on land consolidated therewith on or before one (1) year from this date, this lease shall terminate as to both parties, unless on or before one (1) year from this date lessee shall pay or tender to the lessor or to the credit of lessor in the depositary bank herein named, a rental of _____ Dollars ($_____) which shall cover the privilege of deferring commencement of such operations for a period of one (1) year. In like manner and upon like payments or tenders, annually, the commencement of operations for drilling may be further deferred for successive periods of one (1) year each during the primary term. Payment or tender may be made to the

lessor or to the _____Bank of _____
which bank, or any successor thereof, shall continue to be the agent for the lessor and lessor's successors and assigns. If such bank (or any successor bank) shall fail, liquidate, or be succeeded by another bank, or for any reason fail, or refuse to accept rental, lessee shall not be held in default until thirty (30) days after lessor shall deliver to lessee a recordable instrument making provision for another method of payment or tender, and any depositary charge is a liability of the lessor. The payment or tender of rental and shut-in gas well royalties may be made by check or draft of lessee, mailed or delivered to said bank or lessor, or either lessor, if more than one, on or before the rental paying date.

5. Lessee is hereby granted the right to consolidate or unitize this lease, the land covered by it or any part or parts thereof as to all strata or any stratum with any other land, lease, leases or parts thereof as to all strata or any stratum for the production of oil, gas, or any other mineral. Consolidation in one or more instances shall not exhaust the right of lessee hereunder to consolidate this lease or portion of the oil, gas and mineral estate into other or different units. Units consolidated for oil hereunder shall not exceed forty (40) acres plus a tolerance of ten per cent (10%) thereof, and units consolidated for gas hereunder shall not exceed six hundred forty (640) acres plus a tolerance of ten per cent (10%) thereof, provided that if any Federal or State law, Executive order, rule or regulation shall prescribe a spacing pattern for the development of the field or allocate a producing allowable on acreage per well, then any such units may embrace as much additional acreage as may be so prescribed or as may be used in such allocation or allowable. Lessee shall file written unit designations in the county in which the premises are located. Such units may be designated either before or after the completion of wells. Drilling operations and production on any part of the consolidated acreage shall be treated as if such drilling operations were upon or such production was from the land described in this lease whether the well or wells be located on the land covered by this lease or not. The entire acreage consolidated into a unit shall be treated for all purposes, except the payment of royalties on production from the consolidated unit, as if it were included in this lease. Commencement of drilling operations, drilling operations, drilling, reworking operations, a well capable of producing oil or gas and/or a well producing oil or gas on any portion of a consolidated unit shall have the same force and effect as if such commencement of drilling operations, drilling operations, drilling, reworking operations, well capable of producing oil or gas, and/or a well producing oil or gas located on land with which the land covered by this lease has been consolidated or is pooled shall have the same effect as if located on the land above described and shall operate to continue the oil and gas leasehold estate herein granted for so long as such drilling operations, drilling, reworking operations, a well capable of producing oil or gas shall continue and/or so long as a well producing oil or gas shall continue to produce oil or gas, or so long as the shut-in royalty provided in Paragraph 3 is paid, tendered or deposited. This paragraph shall never be construed as a limitation or restriction of any other provision of this lease, in lieu of the royalties herein provided, lessor shall receive on production from a unit so consolidated only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so consolidated in the particular unit involved.

6. If prior to discovery of oil, gas or other minerals on said land or land consolidated therewith lessee should drill and abandon a dry hole or holes thereon, or if, after discovery of oil, gas or other minerals, the production thereof should cease from any cause, this lease shall not terminate if lessee commences reworking or additional drilling operations within sixty (60) days thereafter, or (if it be within the primary term) commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of two (2) months from date of completion and abandonment of said dry hole or holes or the cessation of production. If a dry hole is completed and abandoned at any time during the last fourteen (14) months of the primary term and prior to discovery of oil, gas or other mineral on said land or land consolidated therewith, no rental payment or operations are necessary in order to keep the lease in force during the remainder of the primary term. If, at the expiration of the primary term, oil, gas or other mineral is not being produced on said land or land consolidated therewith but lessee is then engaged in operations for drilling, mining or reworking of any well or mine thereon, this lease shall remain in force so long as drilling, mining, or reworking operations are prosecuted (whether on the same or different wells) with no cessation of more than sixty (60) consecutive days, and if they result in production, so long thereafter as oil, gas or other mineral is produced from said land or land consolidated therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred fifty (150) feet of and draining the leased premises, lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same or similar circumstances. The judgment of the lessee, when not fraudulently exercised, in carrying out of the purposes of this lease shall be conclusive.

7. Lessee shall have free use of oil, gas and water from said land, except water from lessor's wells and tanks, for all operations hereunder, including repressuring, pressure maintenance, cycling, and secondary recovery operations, and the royalty shall be computed after deducting any so used. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by lessee on said land, including the right to draw and remove all casing. When required by lessor, lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred feet (200 ft.) of any residence or barn now on said land without lessor's consent. Lessor shall have the privilege, at his risk and expense, of using gas from any gas well on said land for stoves and inside lights in the principal dwelling therein, out of any surplus gas not needed for operations hereunder.

8. The rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, executors, administrators, successors and assigns, but no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of lessee. No such change or division in the ownership of the land, rentals or royalties, shall be binding upon lessee for any purpose until such person acquiring any interest has furnished lessee with the instrument or instruments, or certified copies thereof, constituting his chain of title from the original lessor. In the event of an assignment of this lease to a segregated portion of said land, the rentals payable hereunder, shall be apportioned as between the several leasehold owners ratably according to the surface area owned by each, and default in rental payment by one shall not affect the rights of other leasehold owners hereunder. An assignment of this lease, in whole or in part, shall to the extent of such assignment, relieve and discharge lessee of any obligations hereunder, and if lessee or assignee of part or parts hereof shall fail or make default in the payment of the proportionate part of the rentals due from such lessee or assignee or fail to comply with any other provision of the lease, such default shall not affect this lease insofar as it covers a part of said lands upon which lessee or any assignee thereof shall make payment of said rentals.

9. Lessee shall not be liable for delays or defaults in its performance of any agreement or covenant hereunder due to force majeure. The term "force majeure" as employed herein shall mean: any act of God including but not limited to storms, floods, washouts, landslides, and lightning; acts of the public enemy; wars, blockades, insurrection or riots; strikes or lockouts; epidemics or quarantine regulations; laws, acts, orders or requests of Federal, State, Municipal or other governments or governmental officers or agents under color of authority; freight embargoes or failures; exhaustion or unavailability or delays in delivery of any product, labor, service or material. If lessee is required, ordered or directed by any Federal, State or Municipal law, executive order, rule, regulation or request enacted or promulgated under color of authority to cease drilling operations, reworking operations or producing operations on the land covered by this lease or if lessee by force majeure is prevented from conducting drilling operations, reworking operations or producing operations, then until such time as such law, order, rule, regulation, request or force majeure is terminated and for a period of sixty (60) days after such termination each and every provision of this lease or implied covenant arising thereunder that might operate to terminate it or the estate conveyed by it shall be suspended and inoperative and this lease shall continue in full force. If any period of suspension occurs during the primary term, the time thereof shall be added to such term.

10. Lessor hereby warrants and agrees to defend the title to said land, and agrees that lessee, at its option, may discharge any tax, mortgage or other lien upon said land, and in the event lessee does so, it shall be subrogated to such lien with the right to enforce same and apply rentals and royalties accruing hereunder toword satisfying same. Without impairment of lessee's rights under the warranty in the event of failure of title, it is agreed that, if lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid lessor shall be reduced proportionately; should any one or more of the parties named above as lessors fail to execute this lease, it shall nevertheless be binding upon the party or parties executing the same.

11. Lessee, its/his successors and assigns, shall have the right at any time to surrender this lease, in whole or in part, to lessor or his heirs and assigns by delivering or mailing a release thereof to the lessor, or by placing a release thereof of record in the county in which said land is situated, thereupon, lessee shall be relieved from all obligations, expressed or implied, of this agreement as to the acreage so surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases.

IN WITNESS WHEREOF, we sign the day and year first above written.

WITNESSES: _____

_____ _____

_____ _____

_____

THE STATE OF TEXAS } SINGLE ACKNOWLEDGMENT

COUNTY OF }

BEFORE ME, the undersigned authority, on this day personally appeared _____

_____

known to me to be the identical person_____whose name_____are/is subscribed to the foregoing instrument, and acknowledged to me that_____he_____ executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the _____day of _____, A. D. 19_____.

_____

Notary Public in and for _____ County, Texas

THE STATE OF TEXAS } WIFE'S SEPARATE ACKNOWLEDGMENT

COUNTY OF }

BEFORE ME, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared _____

_____, wife of _____, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said wife, acknowledged the same to be her act and deed, and declared that she had willingly executed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the _____day of _____, A. D. 19_____.

_____

Notary Public in and for _____ County, Texas

THE STATE OF TEXAS } JOINT ACKNOWLEDGMENT

COUNTY OF }

BEFORE ME, the undersigned authority, on this day personally appeared _____

and wife, _____, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed. And the said _____

_____, wife of _____, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said _____, acknowledged such instrument to be her act and deed and declared that she had willingly signed the same for the purposes and consideration therein expressed and that she did not wish to retract it.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the _____day of _____, A. D. 19_____.

_____

Notary Public in and for _____ County, Texas

WHEN RECORDED RETURN TO:

This instrument was filed for record on the _____ day of _____, 19_____ at_____o'clock_____M., and duly recorded in Book_____, Page_____, of the _____records of this office.

_____

County Clerk_____County, _____

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